

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965/1966

No. ~~383~~ 12

SANDRA LEE NEELY, ETC., PETITIONER,

vs.

MARTIN K. EBY CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. 1]

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

**No. 7796**

**MARTIN K. EBY CONSTRUCTION Co., Inc.,**  
a foreign corporation, Appellant,

**vs.**

**SANDRA LEE NEELY, by her legal representative and  
guardian, CECILE V. NEELY, Appellee.**

**STATEMENT OF POINTS RELIED UPON BY APPELLANT—**

**Filed June 17, 1964**

The following points are relied upon by Appellant in connection with this proceeding:

1. The United States District Court erred in submitting the issue of proximate cause to the jury, since appellee failed to establish by a preponderance of the evidence or otherwise the proximate cause of the accident in question.
2. The United States District Court erred in submitting the issue of appellant's alleged negligence to the jury, since appellee failed to establish by a preponderance of the evidence either that appellant was negligent or that said alleged negligence was the proximate cause of the accident in question.
3. The United States District Court erred in instructing the jury that the appellant owed appellee's decedent the duty to provide him a reasonably safe and adequate platform, since appellant did not owe decedent such duty.



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4. Appellee's decedent was guilty of contributory negligence or assumption or risk as a matter of law; therefore, appellee was not entitled to recover.

5. The United States District Court erred in denying appellant's Motion for Involuntary Dismissal made at the close of appellant's case, in denying appellant's Motion for [fol. 2] Directed Verdict made at the close of the evidence; and in denying appellant's Motion for Judgment Notwithstanding the Verdict made following reception of the verdict.

McComb, Zarlengo and Mott, By John C. Mott, Attorneys for Appellant.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

No. 7699, Civil.

SANDRA LEE NEELY, by her legal representative and guardian, CECILE V. NEELY, Plaintiff,

vs.

MARTIN K. EBY CONSTRUCTION Co., Inc.,  
a foreign corporation, Defendant.

AMENDED COMPLAINT FOR DAMAGES—

Tendered December 31, 1963

Comes Now The plaintiff by her attorneys and for a claim against the defendant avers and alleges:

1. The plaintiff Sandra Lee Neely was born on October 11, 1960, Cecile V. Neely is custodian and legal guardian of the said Sandra Lee Neely by order of Court.



2. The plaintiff Sandra Lee Neely is the only child of Gary Neely who was killed on August 3, 1961, while working at Missile Silo #2, Complex 2-C near Elizabeth, Colorado.

3. The plaintiff is a citizen and resident of the State of Missouri. The defendant is a corporation organized under the laws of the State of Kansas and having its principal place of business in the State of Kansas but doing business also in the State of Colorado. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.

[fol. 4] 4. The death of the plaintiff's father, Gary Neely, was a direct result of the carelessness and negligence of the defendant and of its employees who were then and there acting in the scope and course of their employment in the erection, maintenance, and supervision of a certain scaffold.

5. As a direct result of the death of her father, the plaintiff Sandra Lee Neely, being dependent upon him for support and maintenance, has suffered pecuniary losses in the sum of \$100,000.00.

Wherefore the plaintiff Sandra Lee Neely acting through her legal guardian and custodian Cecile V. Neely, prays damages against the defendant in the sum of \$100,000.00 plus costs, interest, expert witness fees and for such other and further relief as to the Court may seem appropriate.

Kenneth N. Kripke, One of the Attorneys for Plaintiff.

**IN THE UNITED STATES DISTRICT COURT**

**ANSWER**

Comes Now the defendant above named by its attorneys, McComb, Zarlengo and Mott, and for Answer to plaintiff's Complaint hereinbefore filed, admits, denies, and alleges as follows:

**For A First Defense**

1. Admits that Gary Neely was killed August 3, 1961, while working on or about Missile Silo No. 2, Complex 2-C, near Elizabeth, Colorado.
2. Admits the allegations contained in paragraph 3 of plaintiff's Complaint.
3. Denies each and every other allegation contained in plaintiff's Complaint.

**For A Second Defense**

That the accident, injuries and damages of which the plaintiff complains and alleges were proximately caused by [fol. 5] the sole negligence of Gary Neely, deceased.

**For A Third Defense**

That the accident, injuries and damages of which the plaintiff complains and alleges were proximately caused by the contributory negligence of Gary Neely, deceased.

**For A Fourth Defense**

That the damages of which the plaintiff complains and alleges were the result of an unavoidable accident.

**For A Fifth Defense**

That the accident, injuries and damages of which the plaintiff complains and alleges were proximately caused by the negligence of other persons, firms or corporations, for which the defendant is in no way liable or responsible.

### For A Sixth Defense

That the accident, injuries and death of which the plaintiff complains arose out of and in the course of the employment of plaintiff's decedent (Gary Neely) by Sverdrup & Parcel; that at the time of said accident and death plaintiff's decedent and his said employer were subject to the provisions of the Workmen's Compensation Act of Missouri; that Globe Indemnity Company was and is the compensation insurance carrier for Gary Neely's employer, and was and is liable, and has assumed liability for payment of compensation and death benefits in accordance with the Workmen's Compensation Act of Missouri; that said Globe Indemnity Company has paid compensation as was due under said Act; that said Globe Indemnity Company is therefore the owner or part owner of the claim plaintiff asserts in this case and therefore should be a party plaintiff.

Wherefore, having answered, defendant prays that plaintiff's Complaint be dismissed with prejudice, that defendant be awarded its costs expended herein, and such other and further relief as to the Court may seem equitable in the premises.

McComb, Zarlengo and Mott, by John C. Mott, Attorneys for the Defendant.

Defendant Demands Trial By Jury.

Filed November 23, 1962.



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[fol 6]

IN THE UNITED STATES DISTRICT COURT

JUDGMENT ON VERDICT FOR PLAINTIFF—  
Entered January 22, 1964

This Action Came On for trial on January 20, 1964 before the Court and a jury, the Honorable Alfred A. Arraj, Chief Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict in favor of the plaintiff, it is

Ordered, Adjudged and Decreed that the plaintiff, Sandra Lee Neely, by her legal representative and guardian, Cecile V. Neely, recover of the defendant, Martin K. Eby Construction Co., Inc. the sum of \$25,000.00 with interest thereon at the rate of 6 per cent per annum as provided by law from August 17, 1962.

Further Ordered That plaintiff, above-named, have and recover from the above-named defendant her costs upon the filing of a Bill of Costs.

Dated At Denver, Colorado this 22nd day of January, 1964.

By The Court: Alfred A. Arraj, Chief Judge United States District Court

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IN THE UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT  
OR FOR NEW TRIAL—Filed January 23, 1964

Comes Now the defendant above named, by its attorneys, McComb, Zarlengo and Mott, and moves this Court as follows:

I. This defendant moves the Court to enter an Order herein setting aside the verdict of the jury entered in favor of the plaintiff and against the defendant, and to enter

judgment in favor of the defendant, in accordance with its motion for involuntary dismissal and/or directed verdict made at the close of plaintiff's case, and in accordance with its motion for directed verdict made at the close of all the evidence.

II. If the foregoing motions be denied, then this defendant moves the Court for an Order granting a new trial herein, and as grounds therefor, defendant alleges as follows:

[fol. 7]- 1. The Court erred in refusing to give to the jury Instructions 1 through 4 inclusive, which were tendered by this defendant and refused by the Court.

2. The Court erred in giving any instructions to the jury except an instruction for directed verdict, since the Court should have directed a verdict in favor of this defendant.

3. The Court erred in instructing the jury, over the objection of this defendant, that the defendant had a duty toward plaintiff's decedent to exercise reasonable care to construct a platform which was reasonably safe and adequate to accomplish the purposes for which it was built in the light of all the facts and circumstances as shown by the evidence in the case, when in law and in fact defendant owed no duty whatsoever to plaintiff's decedent.

4. The Court erred in refusing to grant this defendant's motion for mistrial made immediately following an answer given by the witness Fred Blanchard as to his opinion about the platform and scaffold upon which plaintiff's decedent was standing shortly before his death. The question asked of said witness was whether or not he had an opinion, and the question specifically asked for a "yes" or "no" answer, despite which said witness proceeded to advance his opinion.

5. The Court erred in denying defendant's motion for involuntary dismissal and/or directed verdict made at the

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close of plaintiff's evidence, and in denying defendant's motion for directed verdict at the close of all the evidence.

6. The evidence is insufficient to sustain the verdict of the jury.

7. The verdict of the jury is contrary to the law.

8. The verdict of the jury is contrary to the evidence.

Wherefore, defendant prays that the Court enter an Order herein setting aside the verdict of the jury and directing a verdict in favor of the defendant, or in the alternative, that this Court enter an Order granting a new trial in this action.

McComb, Zarlengo and Mott, By John C. Mott, Attorneys for Defendant.

[fol. 8]

IN THE UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING  
VERDICT OR FOR NEW TRIAL—February 27, 1964

This Cause came on to be heard on motion of the defendant for judgment notwithstanding the verdict or for new trial, and the Court having examined the file and heard arguments of counsel for both parties, and now being fully advised, orders that the motion for judgment notwithstanding the verdict and the motion for new trial shall be and hereby are denied.

Dated this 27th day of February, 1964.

Alfred A. Arraj, United States District Judge



IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 20, 1964

Notice Is Given that the above named petitioner, Martin K. Eby Construction Co., Inc. hereby appeals to the United States Court of Appeals for the Tenth Circuit from a judgment which was entered January 22, 1964 in favor of the plaintiff and against petitioner, and from an Order which was entered February 27, 1964, denying petitioner's Motion for Judgment Notwithstanding the Verdict and petitioner's Motion for New Trial.

Dated this 19 day of March, A.D., 1964.

McComb, Zarlengo and Mott, By John C. Mott, Attorneys for the Appellant

[By order of April 21, 1964, the time for docketing the cause in the Court of Appeals was extended to June 18, 1964.]

[A supersedeas bond was filed March 20, 1964.]

[fol. 9]

Official Transcript

Proceedings before the Honorable Alfred A. Arraj, Chief Judge, United States District Court for the District of Colorado, and a Jury of Six, in Courtroom A, Main Post Office Building, Denver, Colorado, beginning at 9:30 o'clock a.m., on the 20th day of January, 1964.

DEFENDANT'S OPENING STATEMENT

Mr. Mott: Ladies and gentlemen, as you have already been told, my name is John Mott, and I am representing the defendant, Martin K. Eby Construction Company, in this case.

I am sure the Court will instruct you at a later part of these proceedings that what is said during the opening

statement, of course, is not evidence, but merely a brief outline by the lawyers as to what some of the evidence will be, and, of course, the case is to be decided on what you hear from the witness stand and from such exhibits and so forth as may be introduced and received into evidence.

Now, of course, there is no question, ladies and gentlemen, but that the accident did happen on August 3, 1961, out there at the missile silo east of Denver, and that Mr. Neely fell from this platform that Mr. Kripke mentioned a considerable distance, some 100 feet I believe or more, to his death.

There is no question, of course, but that the Eby Company was a subcontractor out there for the Martin Company, and there is no question but that the platform that Mr. Kripke is talking about was put there by the Eby Company in the manner in which you will hear from the evidence.

The evidence will be, ladies and gentlemen, that what was there at the time of the accident was open, obvious and well known to everybody and that although Mr.—I think Mr. Wilhoit, and as I recall maybe one other person had already negotiated this step over from the scaffold or platform to the counterweight, that instead of putting his foot on the I-beam like Mr. Wilhoit did, I believe Mr. Kripke mentioned that, I think, the evidence will be that Mr. Neely put his foot on something else there and it didn't hold him and he did fall.

[fol. 10] Of course, the evidence will be that what he did put his foot on was not in any way the responsibility of the Eby Company. They had nothing to do with it.

The evidence will also be that this distance between the counterweight and the platform that we are talking about was not a very great distance. There was a change in elevations and that all of these things were known to Mr. Neely before he stepped out there and that if he did use

no due care when he made this step, of course, that's contributory negligence and he wouldn't be able to recover, nor his daughter, in this case, but the principal evidence will be the Eby Company had nothing whatsoever to do with this accident. The accident was not caused by anything they failed to do or anything they actually did before the accident, and, therefore, at the close of the evidence we are going to ask you for a verdict in favor of the Eby Company absolving them of all liability for this very unfortunate accident.

Thank you very much.

In Open Court

(A jury of six was duly selected and impaneled.)

(Mr. Kripke and Mr. Mott made opening statements to the Jury.)

FRED P. BLANCHARD called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Kripke:

Q. What is your name, please?

A. Fred P. Blanchard.

Q. What is your address?

A. Hazelwood, Missouri.

Q. Your occupation?

A. Engineer.

Q. And you have come to Colorado in this case to testify at my request, is that right?

A. That's correct.

Q. By whom are you employed?

A. By the company of Sverdrup & Parcel and Associates, Inc., engineers and architects.



[fol. 11] Q. Maybe we better speak up a little louder so the Jury can hear. For how long have you been employed by them?

A. Since August of 1956.

Q. And in what capacity?

A. As a senior engineer in charge of design and preparation of design plans.

Q. Did you know Gary Lee Neely?

A. I had a working acquaintance with Mr. Neely, Yes.

Q. Do you know how long he was employed by the same company?

A. At the time I was employed by Sverdrup & Parcel, Mr. Neely was working summers. He was working on his degree at Washington University.

Q. He had not yet graduated?

A. He had not yet graduated.

Q. Did he continue to work with S & P right through this period?

A. He had a short time of military service in connection with his ROTC. Other than that he worked for Sverdrup & Parcel.

Q. Were you employed by S & P on August 3, 1961?

A. Yes, sir.

Q. In what capacity?

A. Day silo captain.

Q. What silo?

A. Silo No. 2.

Q. In the complex at Elizabeth?

A. Known as Complex 2-C.

Q. What was the relationship of the Martin Company to your company?

Mr. Mott: Just a minute, I think he can testify generally, but if we are getting into any legal conclusions or technical matters of that sort—

Mr. Kripke: I am just trying to show a chain of command.

The Court: All right, you may proceed.

A. Could I have the question again?

Q. What was the relationship of Martin Company to Sverdrup & Parcel?

A. Sverdrup & Parcel had a contract to provide engineering services for American Machine and Foundry Company in connection with the engineering and construction of the launcher system in the silos. American Machine and Foundry had a contract with Martin to provide the design and construction of this launcher system.

Q. Now, what generally was the relationship between the Martin Company and Eby Construction, if you know?

A. I—

[fol. 12] Mr. Mott: That's certainly objectionable.  
The Court: Objection sustained.

Q. Well, was there any relationship between Sverdrup & Parcel and Eby Construction Company that you know?

A. As a day silo captain working on the complex, I could request from the Eby carpenters that they place or remove or provide us with different scaffolding at different places, such as the A.M.F. contract to be brought to completion.

Q. Were there others who also had this prerogative?

A. Any craft working in the silo could request a scaffold.

Q. How many crafts were there in the silo?

A. Well, the A.M.F. contract craft, millwrights, electricians, steelworkers. There was also other contractors involved.

Q. Mr. Blanchard, directing your attention to August 3, 1961, can you tell us what was going on that day insofar as the structure or the construction of Silo No. 2 was involved?

A. We did not have access to the silo during the morning because the Corps contract was running a test on a pipe. However, the Martin people came to us at noon time and said we would have sole occupancy of the silo for the rest of the day to run a test referring to the first running of the launcher under its own machinery.

Q. This was the very first time it had been run?

A. This was the very first time it had been run under its own power. Approximately one or two o'clock that

afternoon, we moved into the silo the first time that day. Any A.M.F. craft or A.M.F. people were in the silo, and I requested the Eby day superintendent, who I believe was named McWilliams, that he clear the silo of all scaffolding in preparation for the first movement of this launcher. This would take a considerable amount of time because there was a lot of scaffolding, a lot of safety netting, so forth, throughout this silo. We then started to assign the A.M.F. craft for their particular jobs in connection with this launching movement. We had millwright design workers, electricians, pipefitters, all of them involved in the working of the system, to observe their portion of the mechanism to make sure nothing was wrong. So, after McWilliams started his men cleaning the hole, I started the rest of the afternoon giving assignments.

Q. That took you down to approximately what time?

[fol. 13] A. It was pretty near time for change in shifts, around four or four-thirty, before we were ready to actually start the movements of this launcher.

Q. And Gary Neely was on which shift at that time?

A. He was on the night shift.

Q. What was his job?

A. His shift was to carry on the work I had started during the nighttime, coordinate the day activities with night activities.

Q. Was his title Night Silo Captain?

A. That's correct.

Q. What was the relationship?

A. They worked together. In fact our hours overlapped such that we could coordinate our activities and keep the job moving along continuous to conclusion.

Q. Was one job considered better than the other?

A. Well, usually the day silo captain, having more craft and more people and more direct contact, usually set the pattern for what was to be done and the night silo captain carried on.

Q. Do you know anything about the promotion that I spoke of?



A. Yes, I do.

Q. What was that?

A. He was to become a day silo captain in Silo No. 1 the following Monday.

Q. Now, going back to the afternoon of August 3rd, would you carry on and tell us what happened that you recall that's of significance here?

A. You mean from the change in shift on?

Q. Yes, please.

A. Well, approximately four or four-thirty, we had requested from the Morrison, Knudsen & Hardeman people that they keep most of their day shift on for the continuation of this test. We got the launcher ready for a movement. I think it first started moving approximately five o'clock. I was more or less centered at the middle height of the silo watching for clearances and so forth. As the few pieces of machinery started moving down and counterweights started moving up, Gary was located up on the drive mechanism with the people up there to make sure everything was moving smoothly. At approximately—with several stops along the way for removal of obstructions, at approximately a quarter to seven we discovered that a scaffold that I had requested be placed between the counterweight areas previously was a little too large, a little too extensive to allow the counterweights to pass and to allow the engineering group to make the critical measurements that they needed. Gary was not present at that time. He was doing some other job. I was, and the millwrights' superintendent.

Q. I wonder if the jurors can hear you?

A. At that time the millwright superintendent hollered for either Gary or myself, knowing that both of us were present, to come and see what should be done to coordinate this activity to take these measurements. I discussed the problem with the engineering crew and they showed me where the scaffold was too extensive to allow for a plumb bob measurement from the locking device down to the locking pin that was centered on the counterweight.

So, we decided then that we would hold up the test for a few minutes, have the scaffold modified so these tests could be taken. I hollered for a carpenter and the night foreman approached me from the scaffold that was there. I was back under the drive base on the concrete and he was standing out on the scaffold.

Q. This drive base is where?

A. Very top of the silo.

Q. I see.

A. I was kneeling there on the concrete, talking to him, and he was standing on the scaffold. I pointed out to him, "This piece of wood is in our way making our measurements. Could you please get it modified as soon as possible so we can continue our tests?" He told me he would do this, and so we had our A.M.F. craft stand by while the carpenters remodified this scaffold.

Q. All right, and this modification or some modification was done?

A. This modification was carried out. Approximately twenty or twenty-five minutes after seven, I was given the word—I don't know this date who gave it to me—the scaffolding was completed. I told the M.K. and H. superintendent that his millwrights could carry out their measurements, and at this time I became concerned about the approach of the craft lunch hour in connection with our test. I went back in the scaffold area to see how these measurements were progressing. Gary was standing on the scaffold and assured me everything was going all right, and so I then went topside to find the M.K. and H. superintendent to see if we could have the craft work through the lunch hour until the test was completed.

Q. What was Gary doing on the scaffold?

A. He was standing on the scaffold with his notebook [fol. 15] on the rail, talking to the millwrights. I got his attention and I asked him how things were going and he said, "Everything is under control," or something of that nature.

Q. Do you know if he had begun the measurements?

A. I do not know if he had started it yet.

Q. And what is the next thing, sir?

A. I went topside. I found the M.K. and H. superintendent just outside of the silo mouth. He was in the pickup truck. I was standing there talking to him discussing this possibility of craft working through their lunch hour when Chester Wing, another superintendent of M.K. and H., a night superintendent, ran by us telling us that a man had fallen from top to bottom and he was on the way to get an ambulance.

Q. Do you know how far Gary fell?

A. In exact number of feet, I couldn't say. Be approximately ten stories to twelve stories.

(Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5 and 6 were marked for identification.)

Q. Mr. Blanchard, I hand you what are marked for identification as Plaintiff's Exhibits 1 through 6, inclusive. Would you please look at these photographs and just tell me generally what they represent?

A. No. 1—

The Court: Don't show it to the Jury.

A. (Continued) Okay. No. 1 is a view from the silo wall towards the center of the silo, showing the top of the counterweight in relationship to the scaffold in question.

Q. All right, No. 2? Just go through them quickly.

A. No. 2 is a view from a similar position a little further to the left from No. 1, showing again the relationship of the scaffold to the top of the counterweight.

Q. All right, 3, sir, No. 3.

A. No. 3 is another view taken from a wood stairway that existed on the westerly face of the silo, looking towards the scaffold and the top of the counterweight. No. 4 is a view looking from the bottom of the silo up towards the counterweight in the locked-in position up through the shaft that the counterweight moves in, and No. 5 is a view of the bottom of the silo at the position the counterweight comes to rest when the launcher is up. No 6 is a view

taken from the silo mouth looking towards the drive mechanism, and the counterweights are just below this drive mechanism.

[fol. 16] Q. Mr. Blanchard, can you tell me whether or not these six pictures accurately represent the scene as it appeared on that evening of August 3, 1961?

A. Yes, they do.

Q. Would it be helpful to use these in explaining to the Jury just what happened?

A. Yes.

Q. Now, there are captions on them, cover sheets, which orient what they are. Are these accurate? Have you read these and are they accurate?

A. No, I have not read them.

Q. Would you check them over and see if they are?

A. No. 1 is correct. No. 2 is correct. 3 is correct. 4 is correct. 5 is all right. 6 is correct.

Q. Have you seen these pictures before?

A. Yes, I have.

Mr. Kripke: Your Honor, I offer into evidence Exhibits 1 through 6 inclusive.

Mr. Mott: Could we ask the witness a few questions about these, if it please the Court?

The Court: Yes, you may.

Voir Dire examination.

By Mr. Mott:

Q. Mr. Blanchard, I believe you testified, did you not, that you were not present in the actual area where the accident happened at the moment it did happen, is that correct?

A. Yes.

Q. Do you know when these pictures were taken, Exhibits 1 through 6?

A. As I understand, they were taken the following morning. No craft were allowed back in the silo that day for the purposes of investigation and picture taking.



Q. They were taken the next day?

A. That's correct.

Q. And you are not able to state, are you, that the things that are portrayed in these pictures are exactly in the same position that they were at the time the accident happened, is that right?

A. Only insofar as no work was carried on in the silo from the time the accident occurred.

Q. But you were not present from the time that you left shortly before the accident until when? When did you next go back into this area after the accident happened?

A. Not until the following Monday.

Q. And these pictures were taken what day?

A. On Friday.

[fol. 17] Q. And you were not present then when the pictures were taken?

A. We were not allowed there, no.

Q. Do you know from what angle these pictures were taken?

A. Knowing the layout of the silo, I could judge approximately what it was.

Q. They are distorted somewhat, are they not, as far as the relative relationships between various objects that are portrayed in there?

A. As any photograph might be.

Mr. Mott: Well, we would object at this time to the introduction of these pictures, if it please the Court. The witness said he was not there when the accident happened. He wasn't there until some two or three days later, and he was not present when these pictures were taken and cannot state positively whether anything was moved between the time of the accident and the time the pictures were taken. Also, that they do show some distortion.

The Court: May I see the exhibits, please?

I think at this point we will have a brief recess.

Ladies and gentlemen of the Jury, you may go to your jury room. Now, during this recess, together with any other recesses we may have during the progress of the

trial and until the case is finally submitted to you for your deliberation, you should not discuss the case either among yourselves or with any other person. I ask you not to discuss the case among yourselves, because you should not start talking about the case until you have heard all the evidence in the case, the summation of counsel and the Court's instructions. So at this time you may leave the jury box. The bailiff will escort you to your jury room.

We will be in recess for approximately ten minutes.

(The Jury withdrew from the courtroom and the following proceedings were had outside the presence of the Jury.)

### Outside the Presence of the Jury

The Court: Mr. Kripke, do you have any response to the objection that counsel has made to the tendered exhibits?

Mr. Kripke: Well, perhaps I better ask Mr. Blanchard one or two more questions. I don't think I can bring out anything particularly new, but it might bring out something.

[fol. 18] The Court: All right.

### Direct examination.

### By Mr. Kripke (Continued):

Q. Did I understand you to say there were no craft allowed into that silo between the time of the accident and the next Monday, when was it?

A. The Air Force and Martin together excluded anybody from that silo the day after the accident.

Q. For what purpose?

A. For an investigation.

Q. Was this an official government investigation?

A. I don't believe the Air Force wanted to get involved in an official investigation.

Q. Do you know who conducted it?

A. I know A.M.F. was very interested. Other than that, I don't know for sure.

Q. Do those pictures portray the conditions at the time you left the silo on August 3, 1961?

A. Yes.

Mr. Kripke: I have nothing further.

Mr. Mott: If it please the Court, I would like to ask the witness one further question.

Voir Dire examination.

By Mr. Mott:

Q. Specifically, Mr. Blanchard, I see a net in there in Exhibit No. 4. Was there a net in there at the time?

A. The nets were secured by A.M.F. in connection with tying down the launcher to leave the silo. They added the nets for investigation purposes so no further people would be hurt, and the pictures were taken after those nets were added.

#### COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Does the net appear in any of the other exhibits, Mr. Mott? It looks like a part of a net in 6.

Mr. Mott: That's in a different part of the place. As I understand, the thing we are talking about is over in here. I don't know what that is in there.

The Court: This looks—

Mr. Mott: Oh, I see, yes. I didn't notice that.

[fol. 19] Mr. Kripke: That's not where he fell, Your Honor.

Mr. Mott: If it is not where he fell, it is not material anywhere.

Mr. Kripke: You misunderstand. Where you are pointing, to, where the net is, is not where he fell. He fell through the hole back here, you can see, and you can see part of the scaffolding. This is the drive shaft that was talked about.

The Court: Well, do you have any specific objection to 6 then?

Mr. Mott: No, for the reason it does show part of a net, I certainly object to that.

Mr. Baum: It is in the crib.

Mr. Mott: Well, I know, but if it is in the crib it isn't in the part of the silo where the accident happened.

The Court: Well, let's see here.

Mr. Kripke: Your Honor, I do know we ought to know specifically which he is objecting to.

The Court: I am sure he said 4.

Mr. Mott: I specifically mentioned the nets in 4. I actually objected to all of them.

The Court: Yes, he specifically mentioned the net in 4, and I inquired about 6, and he now stated he objected to that.

Now, if you can have the witness explain 6, maybe that net was there prior to the accident. You can ask him.

#### Direct examination.

#### By Mr. Kripke (Continued):

Q. Let's take these. As to 4, Mr. Blanchard, was this netting that is in the silo proper there at the time of the accident?

A. No, it was not. It was added later to protect the people making the investigation.

[fol. 20] Q. Now, as to Exhibit 6, was that netting there?

A. That was not there at the time of the accident.

Q. Do these pictures other than that accurately represent the scene?

A. Yes, sir.

#### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Kripke: Your Honor, we have no way of replacing these pictures with pictures that don't have nets, and they are certainly useful to explain the circumstances to the



Jury. The Jury could be specifically instructed the nets in those two pictures were not in place.

The Court: Do you, Mr. Mott, feel that the showing of nets here prejudices your case?

Mr. Mott: Yes. It puts them in a position to argue that nets were put up there subsequent to that and anything done there after the accident happened couldn't be used to prove anything in this case.

The Court: All right, the objections will be sustained to 4 and 6 and will be overruled to the other four, and those four will be received.

(Plaintiff's Exhibits Nos. 1, 2, 3 and 5 were received in evidence.)

The Court: We will take a brief recess, gentlemen.

(The court recessed from 11:15 o'clock a.m. until 11:30 o'clock a.m.)

(The Jury returned to the courtroom and the following further proceedings were had in the presence of the Jury.)

#### In Open Court

Mr. Kripke: May it please the Court, it is my understanding that Exhibits 1, 2, 3 and 5 are admitted, and to numbers 2 and 4 the objection was sustained.

The Court: 4 and 6.

Mr. Kripke: 4 and 6, I am sorry.

[fol. 21] The Court: That's right.

#### Direct examination.

By Mr. Kripke (Continued):

Q. Mr. Blanchard, would you mind stepping from the box and taking Exhibit 1 and showing it to the Jury and orienting to them, explaining, what the picture is about?

A. I wonder if I could use the board?

Q. Yes, please do.

A. (Witness drawing on blackboard.) Picture, if you will, a large cylindrical hole in the ground, about ten

stories high. Near the top of this hole, but still not at ground level, is an area back over in here with a concrete base, above which is located all the drive machinery for this system, and located within this hole is a steel framework which we all referred to as a crib, in which the launcher was able to ride up and down. For purposes of construction, we had this circle divided into quadrants, so that if anybody wanted to know where we were working, we were working in such-and-such a quadrant. Those were divided in this way: This was Quadrant I, Quadrant II, Quadrant III, and Quadrant IV. The counterweights that we have been referring to rode in Quadrant II and in Quadrant III, and they rode a system of rigid rails that were fixed back here into the concrete, and they had an odd shape such as they would fit the cylindrical shape of the silo as well as ride up and down and clear the crib.

Now, with that in mind, I believe I can orient you in respect to the pictures. This picture, No. 1, is taken from about this position, looking over the counterweight towards the area that was scaffold. The cables in the picture are the cables that connect the counterweight mechanism with the launcher mechanism to help balance it. At this point, the counterweights are approximately six feet from their locking mechanism. They still had six more feet to come up.

Q. Can that be seen in that picture?

A. Pardon?

Q. Can that be seen, the locking mechanism and the distance, in that picture?

A. The locking mechanism in the counterweights are these two holes right here. The locking mechanism up on the drive are these two pins right—there is one right there and one right there. These two pins would go into these two holes when the counterweights were up.

Q. Can this be seen better in Picture No. 2?

[fol. 22] A. Picture No. 2 was taken a little further over in this direction, showing the same general area. You see the locking mechanism, the counterweight and the locking

méchanism at the top. And during the process of construction, there was a series of wooden stairs built in this section, Quadrant I and II, for access of the different craft to and from the hole, carrying out their work, and Picture No. 3 was taken approximately in that position on the stairway, showing the same general area. Picture No. 5 is taken at the bottom of the silo from on top of some steel grating, looking over in this direction. You can see these two counterweight rails and the pit in which this counterweight rested when the launcher is up in the area.

Q. You would look straight up? From that Picture No. 5, you would be looking up at the bottom of the counterweights?

A. When the counterweight is in the up and locked position, from that picture you would see up to the bottom.

Q. That would be Counterweight No. 2?

A. The counterweight in the second quadrant.

Q. Now, I think that's sufficient for the diagram, Mr. Blanchard. Now, there are a few more questions I want to ask you. Do those pictures show the scaffold that we have been talking about?

A. Three of them do, yes.

Q. Now, going back, what specifically did you tell this gentleman from Eby that you spoke to about this scaffolding?

Mr. Mott: I think we ought to identify who this person is. He never mentioned him by name or any other way, and I think before he can answer that he should at least identify to whom he was speaking.

The Court: I think he said he didn't know the person. Do you know the person to whom you spoke?

The Witness: Unfortunately, he was the day shift man. These carpenters—

The Court: Well, just answer my question.

The Witness: No.

The Court: All right.

By Mr. Kripke:

Q. I see. Well, can you identify in any way the man you spoke with?

A. I know he was a foreman.

[fol. 23] Q. Of the Eby group?

A. Of the Eby group.

Q. It was he you spoke with?

A. Yes.

Q. What was it you told him?

Mr. Mott: Well—

The Court: Describe the man. You can identify him in more detail than just that. He can describe the man and say foreman of what shift and so forth.

A. He was a foreman of the evening shift for the Eby carpenters. He was rather short, slight build, talked with a rather high-pitched voice.

Q. You don't recall his first name?

A. No.

Q. All right, what was it you talked to him about?

A. I showed him where the scaffold that was there was in the way of our measurements, specifically a plumb bob measurement to be taken from the drive base locking mechanism to the counterweight locking mechanism, and I asked him to revise this scaffold so that we would be able to take this measurement.

Q. I see, to revise it so that you would be able to take the measurements?

A. Yes.

Q. Now, what is the extent of your education and background, Mr. Blanchard?

A. I have a bachelor's degree in civil engineering from Northern University in Boston, Massachusetts. A master's degree in civil engineering from Princeton Polytechnic Institute in Princeton, New York.

Q. Have you done any teaching?

A. Approximately five years.

Q. What?



A. Rensselaer Polytechnic Institute.

Q. What were you teaching?

A. Juniors and seniors in construction engineering.

Q. From your familiarity with the scaffolding involved here, with Counterweights 2 and 3, and from your educational background and experience in structural engineering, are you able to state, sir, whether or not, and this just calls for a yes or no answer, whether or not that scaffolding was adequate and proper to do the job that you had?

A. I did not consider it so.

Q. Why did you not consider it so?

Mr. Mott: Just a minute, if it please the Court, I thought he was supposed to answer that question yes or no, and go from there.

[fol. 24] The Court: He was instructed to. Counsel told him to say yes or no, and he didn't follow the instructions. Do you want the answer stricken?

Mr. Mott: Absolutely. I would like to be—

The Court: I will grant your motion to strike the answer, yes, it was not responsive.

Q. Just a yes or no at this point.

A. No.

Q. Did you understand the question? The question was whether or not as a result of your background and experience and your observations of this scaffold, you are now able to express an opinion from an engineering viewpoint as to whether or not this scaffold was adequate and proper for the purpose it was to be used.

A. No.

Q. You are not able to do so?

A. Well, I am sorry.

Q. Did I word it—

A. Could you give it to me again, please?

Q. Yes, as a result of your knowledge of the scaffold and your background and experience in structural engineering, are you able to express an opinion as to whether or not this particular scaffold was adequate and proper for the job for which it was designed?

A. Yes.

Q. I am going to ask you next, what was that opinion, and Mr. Mott is going to object, but I will ask now what was that opinion?

Mr. Mott: To which we object, and I would like to be heard on this point. This is not a matter which is subject to any opinion testimony of this type.

The Court: Your objection is sustained.

Mr. Kripke: Your Honor, may I make an offer of proof outside of the presence of the Jury in this matter?

The Court: Yes, we will do it at the next recess on this point.

Mr. Mott: Well, I have a motion I want to make at this time, if it please the Court.

[fol. 25] The Court: Well, counsel, approach the bench and state to the reporter—I will be able to hear you, you tell the reporter on the record what you want.

At the Bench

#### MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Mott: 'At this' time the defendant moves for a mistrial for the reason that the witness, despite cautioning by counsel and Court, has already expressed his opinion with regard to his scaffolding. It is not an opinion which can properly be given. The Court has so held at this time, and at this point this evidence is before the Jury.

Mr. Kripke: May it please the Court, counsel was very slow to respond and allowed the answer to go in before he made his objection. There was plenty of time in which to make his objection when he saw the witness was not responding properly.

Mr. Mott: He only said two words.

The Court: Well, the motion for mistrial will be denied. I don't know whether I struck the answer from the record or not.

Mr. Mott: Yes, you did.

The Court: And instructed the Jury?

Mr. Kripke: I think you did, sir.

The Court: All right, the motion will be denied.

Mr. Kripke: And at the next recess—

The Court: Yes.

In Open Court

Mr. Kripke: May we approach the bench again?

The Court: Yes.

At the Bench

[fol. 26] Mr. Kripke: May it please the Court, could I ask whether the reason for sustaining the question is whether I did not properly lay a foundation?

The Court: The reason was that this was not the proper subject for opinion evidence, and that's the basis on which I sustained the objection.

Mr. Kripke: As to whether the scaffold is properly and adequately built?

The Court: That's right. This is what the Jury is to determine from the factual evidence, as to how it was built and so forth.

In Open Court

Mr. Kripke: All right, sir, I have no further questions of this witness.

The Court: All right.

Cross examination.

By Mr. Mott:

Q. Mr. Blanchard, I believe you have testified, have you not, that you are at the present time in the employ of Sverdrup & Parcel?

A. That's correct.

Q. And that is an engineering firm in St. Louis or in the St. Louis area, is it not?

A. Yes.

Q. That was the same company, was it not, who employed Mr. Neely at the time of this accident?

A. Yes.

Q. Now, as day silo captain—I believe that's what you said you were, was it not?

A. Yes, sir.

Q. Were your duties confined to this particular silo?

A. That's correct, sir.

Q. And, in other words, all the work or at least most of the work that you did out there was in this one silo that you sketched on the board?

A. Right, sir.

Q. And, of course, it is true, I am sure, is it not, that there were other silos in that area?

A. Yes, sir.

Q. But you were just in this one?

A. Yes.

Q. Now, if any of this information is in any way classified, Mr. Blanchard, and you cannot answer it, please say so. Are you able to give the circumference of the silo?

[fol. 27] A. This would only be from memory.

Q. Well, approximately.

A. Approximately 50 feet.

Q. That would be 50 feet?

A. In diameter.

Q. In diameter, and are you permitted to give the depth?

A. I would judge about 130 or 140 feet.

Q. Now, there were numerous crafts working in that area, were there not?

A. There were.

Q. And not only were there numerous crafts, Mr. Blanchard, but they were also employed by numerous or at least several contractors, is that right?

A. During the test, they tried to limit the occupation of the hole pretty much to one contractor.

Q. And it was—or, one of your duties was to coordinate the crafts that were working, is that right?

A. The A.M.F. crafts.

Q. Sir?

A. Only American Machine and Foundry crafts.

Q. Now, you say that Mr. Neely was employed by Sverdrup & Parcel. You also mentioned millwrights I



believe that were in the area at the time. Do you know who employed them?

A. They were employed by Morrison, Knudsen and Hardeman, but I was considering them as A.M.F. craft because they were working for A.M.F.

Q. In other words, when you wanted something done, you felt you could request these millwrights to do it?

A. Through their supervisors.

Q. And this would also be true of other crafts who were in the area and working on a given test, was it not?

A. Yes.

Q. Now, I don't know if you testified to this or not, sir, but in the crib that you have drawn on this blackboard diagram, this square that is more or less positioned in the center of the circle, that's actually where the missile itself would go up and down, is that right?

A. That's correct, sir.

Q. And it went up, did it not, or down on what you might call a launcher platform?

A. Correct.

Q. And it is also true, is it not, that the launcher or platform occupied most of this crib area when it was moving?

A. That's correct.

Q. And when the crib or when the launcher went down, the counterweights that you have drawn on there went up?

A. That's right.

Q. And when the counterweights went up, the launcher went down?

A. Correct.

Q. Now, earlier on this day—what time did you go to work on August 3, 1961?

A. Our work day started at 7:00.

[fol. 28] Q. And sometime during that day and prior to the accident we are talking about, you were given the first opportunity, is that what you said, to actually observe the operation of the launcher up and down?

A. This was the first opportunity for this complex to see a launcher driven under its own power, right.

Q. And when you came to work that day, was the launcher at the bottom or at the top, if you recall?

A. The launcher was at the top.

Q. And during the day, Mr. Blanchard, did you observe the lowering of the launcher from the top to the bottom?

A. During the operation of this test, yes.

Q. At approximately when did the lowering of the launcher begin?

A. It was late afternoon, after the change of the Morrison-Knudsen shift.

Q. Were measurements made while the launcher was being lowered?

A. No, sir.

Q. I believe you have testified, have you not, that the launcher wasn't really lowered all the way to the bottom, is that correct?

A. That's correct.

Q. Is that because there is some critical distance in there which you wanted to measure?

A. Yes, sir.

Q. In other words, it was not lowered to the bottom essentially?

A. That's correct.

Q. That's an unfair way to put it. It was lowered to an area short of the bottom essentially?

A. Right.

Q. About how far was that?

A. In the neighborhood of six feet.

Q. And if the launcher was about six feet from the bottom, then the counterweights will be about six feet from the top?

A. That's correct.

Q. And there were some critical measurements to be made while the counterweights were in that position, is that correct?

A. Correct.

Q. And is it also not correct, Mr. Blanchard, that in order to make the measurements on the counterweights,

it was necessary for somebody to get out on the counterweights?

A. That's correct.

Q. How many people were needed to actually get onto the counterweight?

A. Well, all craft had to work in pairs, so there would be a minimum of two. We had assigned two to each counterweight, plus the supervisor.

[fol. 29] Q. What's this square area at the top of this diagram on the blackboard?

A. That is the location of the drive mechanism for the launcher.

Q. Now, there was no way, was there, Mr. Blanchard, in which the measurements could be made on these counterweights from the top, is that right?

A. That's right.

Q. Somebody had to get down onto them?

A. That's correct.

Q. You determined, did you not, that a platform should be installed between the two counterweights.

A. This was set down in the test procedure, yes, sir.

Q. And then you directed that that be done, is that correct?

A. Correct.

Q. And you say that you made that direction to the Eby night carpenter foreman?

A. The day shift provided me the original scaffold.

Q. When was the original platform put in there?

A. Earlier in the week.

Q. How long had it been there?

A. Several days.

Q. But at any rate, when the launcher was lowered, you determined that the scaffold or the platform there interfered with the counterweights, is that correct?

A. It interfered with our making a plumb line measurement.

Q. So, on the afternoon before or just before the accident happened, you directed that this platform be modified, is that right?

A. I told the foreman to modify it so we could make these measurements.

Q. And you say the platform without modifications had been there about a week?

A. Several days.

Q. And during that period of time, who used the platform?

A. Nobody.

Q. You had observed it, however, had you not?

A. There was no need for its use.

Q. Well, you saw it there.

A. Yes.

Q. And then the modification that you requested was to make it a little smaller, was it not?

A. Fix it so we could make these measurements.

Q. Did you discuss this with a Mr. Beardsley of Martin Company just before?

A. No, sir.

Q. But you did direct the carpenter foreman to modify this platform?

A. Correct.

Q. Where were you physically when you made that direction?

[fol. 30] A. I was kneeling on the concrete about where the arrow is with a No. 1 on it.

Q. You mean this No. 1 up here? (Indicating blackboard.)

A. Right.

Q. I will put a circle around it, so we won't be talking about this Roman Numeral I at the bottom. (Marking on diagram.) In other words; you were at the top level, then?

A. Still not quite ground surface, but at the top of the cylindrical hole, yes, sir.

Q. Where was the carpenter foreman, when you made those directions?

A. He was standing on the scaffold as it had been for several days.

Q. Just a few feet from you then?

A. Right.



Q. And you stayed there, did you not, while he did the modification?

A. No, I did not.

Q. Where did you go?

A. I was involved with many other things going on in the silo. I had to see about getting this craft and this lunch hour business straightened up.

Q. Well, would that take you out of the silo area then?

A. It would take me to find the supervisor of personnel that I would have to contact.

Q. Well, how far did you go?

A. About 40 feet below this point, there is a personnel tunnel coming in from the tunnels connecting the complex. I went down to that area.

Q. Well, could you see up to the top when you were down there?

A. I may have been able to. I don't recall if I did.

Q. Your men or nobody employed by S & P was on this platform while it was being modified, were they?

A. To my memory, it wasn't.

Q. The platform was about six feet, was it not, below the top or below the highest point that the counterweight would reach?

A. An average man could stand on it without bumping his head.

Q. And the platform extended, did it not, from the silo wall there, that circle, out onto that I-beam at the top?

A. Which platform, the one that was there originally or the new one?

Q. Well, where was the one that was there originally? [fol. 31] A. The one that was there originally had a walkway coming from the wooden stairs over to it and it was extended from the I-beam back to the silo wall and it overlapped the counterweight area slightly.

Q. Would that be in this area here I am pointing to with my pencil?

A. No, sir.

Q. Where was it? Would you put a mark on there where it was? The original platform, I am talking about.

A. The original platform I requested from these people took in about this area, together with a walkway with handrail going over to the stairs.

Q. Then you ordered that the thing be made smaller, did you not?

A. I ordered it revised so that these measurements could be taken.

Q. On an up and down level, where was this old platform with relation to the counterweight?

A. The supporting members rested on the I-beams in the crib. I would judge it was the same level as the second one that was built.

Q. At any rate, the platform was on the level that you wanted it, was it not?

A. Correct.

Q. How many carpenters worked on the modification?

A. There is a question about that, sir.

Q. Well, were you there?

A. It was all that was on the night shift, I know.

Q. Well, you say that you talked to the night carpenter or the carpenter foreman there and told them to do this work. Were you there when he started?

A. No, sir.

Q. Were you there while the work was being done?

A. No, sir.

Q. Were you there when the work was finished?

A. Stopped there briefly to talk to Gary later, yes.

Q. Were the carpenters gone at that time?

A. Yes.

Q. Then you gave the order, did you not, for the millwrights to start making the measurements?

A. Somehow, I received word that the scaffold was complete, and I told the M.K.H. millwrights they could make their measurements.

Q. Where were you when you told the M.K.H. millwrights they could make the measurements?

A. Over on the stairway.

Q. At what level?

A. Between the personnel tunnel and the top.

Q. How far below the platform would you be when you said that?

A. About 20 feet.

[fol. 32] Q. About that time, the carpenters were gone, were they not?

A. If they weren't, they were getting ready to.

Q. You made no effort to keep them there any longer?

A. No, sir, it was their lunch hour.

Q. The platform was where you wanted it then, wasn't it?

A. I can't say that I actually looked at it and said, "This is it, that is what I want," no.

Q. At any rate, you told the M.K.H. millwrights to go on there?

A. Told them to go ahead and make their measurements.

Q. And that's what the platform was there for in the first place, wasn't it?

A. For access, yes.

Q. Do you know how far the floor of the platform was above or below the top of the counterweights?

A. Only from measurements I had seen from a diagram later.

Q. How far was that?

A. Less than two feet.

Q. How far was the edge of the platform from the counterweights on a horizontal plane?

A. From one to two feet.

Q. Now, I show you Exhibit 1, Mr. Blanchard, and ask you whether or not this platform that appears on the right side, I guess you would call it, of the photograph is the platform we are talking about.

A. That's correct.

Q. Would you put a "P" on that, please?

Mr. Mott: Should we mark this, Judge, or do you have anything special?

The Court: Whatever would show up.

A. Mark a "P" where?

Q. On the platform I just mentioned.

A. (Witness marked on exhibit.)

Q. Thank you, sir, and is the counterweight or one of the counterweights in the lower portion of this picture?

A. That's correct, sir.

Q. Would you put a "C" on that?

A. It goes from here to here. (Marking on exhibit.)

Q. All right, put another "C" on the other half of it.

A. (Witness marked on exhibit.)

Q. That's all one counterweight, where the two "C's" are, is that correct?

A. Yes.

Q. And then it was about two feet then from the platform to the top of the counterweight?

A. Less than two feet.

Q. And two feet or less than two feet from the edge of the platform to the edge of the counterweight?

A. Yes.

[fol. 33] Q. Is that right?

A. Yes.

Q. When the millwrights were going to go on or started to go on with the platform, then you were down on these stairs, about 20 feet below?

A. Correct, sir.

Q. Then after you went up, or I mean after that, did you then go up to the platform where the millwrights were?

A. I went up in around back of where the drive mechanism was and kneeled down on the concrete about the same position that I had talked to the Eby foreman at.

Q. In other words, you went out to this place where there is a "1" with a circle around it?

A. Right.

Q. Which would be about six feet above the platform.

A. Well, the concrete was only about four feet. The underneath, where the lock mechanism was, was six feet. There was a space you could look through.

Q. You could look down and see the platform?

A. Yes, sir.



Q. Were the millwrights on it?

A. At that time only Gary was there.

Q. Could you observe some millwrights?

A. I observed one or two here and there.

Q. At the time you observed Mr. Neely, that particular moment, he had a notebook or something?

A. Yes, sir.

Q. He was recording measurements that were being yelled to him from these millwrights?

A. I believe he was getting ready to record them, yes, sir.

Q. He made some statement to you that everything was under control?

A. Correct.

Q. And you left?

A. Yes, sir.

Q. And shortly after that you were told that the accident happened?

A. That a man had fallen, yes.

Q. Now, the platform we are talking about here, Mr. Blanchard, that's a temporary setup, is it not?

A. That's a temporary scaffold, yes.

Q. It wasn't a permanent part of the installation at all?

A. No.

Q. And it was something that would be changed sometimes from hour to hour, would it not?

A. Correct.

Q. And this whole situation was a sort of, oh, progressively changing one, was it not?

A. As the construction proceeded, yes, sir.

Q. This area was well lighted at the time, was it not?

A. It had the permanent silo lights, plus some extension cords.

Q. Well, it wasn't dark in there?

[fol. 34] A. Well, it isn't as well lighted as this is right here.

Q. At any rate, you could see from where you were at—number one, you could see the platform?

A. Correct, sir.

Q. You could see the counterweights?

A. Correct, sir.

Q. And you could see that there was a gap between them, couldn't you?

A. Yes, sir.

Mr. Mott: I have no further questions.

Mr. Kripke: I have a few questions, Your Honor. I will try to make this quick.

Redirect examination.

By Mr. Kripke:

Q. Is there a colored chalk there? Mr. Blanchard, would you mind coming forward again and drawing for us the area that this platform or scaffold covered after it was modified?

A. It went approximately in this area. (Witness drawing on blackboard.)

Q. That will be the yellow rectangle that you have now drawn, part of it dotted?

A. Yes.

Q. Do you know where the railings were?

A. I believe there was one across the back and one part way down this side.

Q. Ending where?

A. About even with the front of the counterweight.

Q. So that there was an opening between this crib wall or whatever you call it and the end of the railing, is that correct?

A. Yes.

Q. All right, one other thing, what would the distance have been from this point where the scaffolding met the crib wall on a diagonal to the nearest corner of the counterweight approximately?

A. You mean on going down as well as across and around? Less than two feet here and less than two feet here.

Q. All right, what would it be if the counterweight were level to the scaffold?

A. Less than two feet from here to the counterweight.

Q. I mean, what would be the diagonal, the difference from that point to that point, if the counterweight were even with the scaffold?

A. About two feet, maybe a little more.

Q. Now, as I understand it, the scaffold was not even with the counterweight, is that right?

[fol. 35] A. The elevation of the counterweight was dictated by the beam that rested on the crib.

Q. You mean the scaffold?

A. Right, the scaffold, the height of it was dictated by what was resting on the crib.

Q. How far below that was the counterweight?

A. Less than two feet.

Q. Now, what was it—so that we will be clear on it—what was it that—in what way was it that Eby did not comply with your request?

Mr. Mott: Just a minute, I don't think he said they didn't in the first place.

Mr. Kripke: Let me ask the preliminary question, Your Honor?

The Court: All right.

Mr. Mott: He said he wasn't there when they left.

The Court: Well, the objection is sustained. You may proceed with your interrogation.

Q. Did Eby comply with your request with regard to this modification?

Mr. Mott: Objected to for the same reason. This isn't an equity contract anyway.

Mr. Kripke: This is not the question.

The Court: There is no evidence he made any request other than to modify it so he could measure it with a plumb, that's my understanding of his testimony.

Mr. Kripke: Well, perhaps I better be a bit more specific.

The Court: All right.

Q. Mr. Blanchard, were you any more specific than that when you spoke with the Eby night carpenter foreman? What is it that you asked him to do?

A. I showed him that we couldn't make our plumb measurement, would he please revise the scaffold so we could.

[fol. 36] Q. Well, now did you ask him—can you tell us whether you asked him to build the scaffolding from counterweight to counterweight or not? Did you have any conversation like that?

A. Directly, I don't recall.

Q. Now, the carpenter craft is a completely different craft, is that right?

A. They were not part of our A.M.F. craft, no.

Q. What would happen if somebody in the A.M.F. craft tried to make any revisions in the scaffold?

Mr. Mott: Objection as immaterial, if it please the Court.

The Court: Objection sustained.

Q. Can you tell us whether or not there was planking around, any loose planking around, of any kind around handy?

A. We had just removed considerable scaffolding from the hole and stored it topside to make room for this launching.

Q. So, is your answer no?

A. There would be plenty of scaffolding around, scaffolding material.

Q. Would your people of your craft be permitted to either make a catway across there or anything else?

Mr. Mott: Objected to as immaterial.

The Court: The objection will be overruled. You may answer the question.

A. Could I have that question again, please?

Q. Yes, would your people be permitted to use that planking or loose scaffolding in any way to bridge the gap?



A. No, sir.

Q. Why not?

A. It was not part of their jurisdiction.

Q. Was it part of your jurisdiction?

A. No, sir.

Q. Whose jurisdiction would it have been?

A. It is the carpenters' and their work, their contractor.

Mr. Kripke: Thank you, Mr. Blanchard, I have no further questions.

Mr. Mott: We have no further questions.

The Court: You are excused, Mr. Blanchard.

[fol. 37]

#### COLLOQUY BETWEEN COURT AND COUNSEL

Outside of the Presence of the Jury.

The Court: All right, Mr. Kripke, do you want to put in the record your offer of proof?

Mr. Kripke: Your Honor, the Court having ruled that it sustained the objection on the ground that this is not a matter of expert testimony, of course, it serves no value to put in or advise the Court of what the evidence would be. Obviously, the man was going to testify it was defective because it didn't cover the distance between the two counterweights, obviously, and left gaps, for one thing, and because of the railings.

But, your Honor, I believe there is ample law in Colorado to the effect that various matters of testimony which are not within the common knowledge are proper as expert testimony. One, the case I think of is Remley vs. Newton, a Colorado case.

The Court: Mr. Kripke, the Court has ruled and has permitted you to make an offer of proof. I don't want to rehash my ruling. I have ruled.

Mr. Kripke: Well, Your Honor, there is no need of my making the offer of proof on the fact that that was the ground on which the objection was sustained.

In Open Court

ARNOLD KEENAN called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Kripke:

Q. What is your name, please?

A. Arnold Keenan.

Q. Your address, sir?

A. 1629 Manitou Boulevard, Colorado Springs.

Q. What is your occupation?

A. I am a carpenter.

Q. For how long have you been a carpenter?

A. Twelve years.

Q. By whom were you employed on August 3, 1961?

A. Martin K. Eby.

Q. That's the defendant, Martin K. Eby Construction Company?

A. Yes, sir.

[fol. 38] Q. On what job, sir?

A. On the missile base at Site 2-C.

Q. Mr. Keenan, I want to direct your attention to August 3, 1961. On that day, did you have occasion to participate in a modification of certain scaffolding close to the top of the hole, near the drive shaft?

A. I did.

Q. And in that modification, were you acting in the scope and course of your employment for Eby?

A. Yes.

Q. What was your experience with scaffolding? How much of it had you made in your lifetime or how much scaffolding have you been on or had occasion to observe?

A. On the missile bases, it was about two months, a month and a half.

Q. Have you had occasion in your work as a carpenter at other times to work on scaffolds?

A. Yes, sir.

Q. Now, do you recall receiving orders on August 3, 1961, to modify that scaffolding?

A. Yes, sir.

Q. Who was that from?

A. Wayne Imel, carpenter foreman.

Q. Was he the night foreman?

A. Yes, sir, carpenter foreman.

Q. Would you describe him?

A. He is short, light complected, talks in a high-pitched voice.

Q. He was the same—strike that. Was there only one night carpenter foreman in Silo No. 2?

A. Yes, sir.

Q. Was he an employee of Eby Construction Company?

A. Yes, sir.

Q. Now, did you then proceed to modify that scaffolding?

A. Beg pardon, sir?

Q. Did you then proceed to modify the scaffolding?

A. Yes, sir.

Q. Can you tell us what you did? First, I perhaps better ask how many men were involved in that operation.

A. There were several laborers, myself and another carpenter, and there might have been one more, and Wayne Imel, the carpenter foreman.

Q. All right, can you tell me now what you did?

A. The scaffold was already torn out and we were ready to put the other scaffold in its place. We took 4 by 4's and placed them from the crib to the top of the approximately 12-inch or 18-inch water main that goes around the outside of the silo.

Q. Could we stop just there? Mr. Blanchard previously made the drawing on the board. Have you had occasion to previously see it?

A. No.

[fol. 39] Q. Well, by looking at this drawing, can you understand it?

A. Yes.

Q. It has four quadrants, Roman Numerals I, II, III

and IV, and this is where I believe the missile would be, in the middle, and up here in yellow, Mr. Blanchard marked his impressions of what he thought the scaffold to be, the position, after it was modified. Do you understand this?

A. Yes, completely.

Q. And Counterweight No. 3 is over here and Counterbalance No. 2 is over here, is that right?

A. Yes.

Q. Does this square with your recollection of where the scaffold was?

A. Yes.

Q. All right, now, you have said that you stretched your platform from this line, and what is that, sir?

A. That is part of the crib, an I-beam.

Q. To the rounded part of the wall?

A. Yes, there is a water main that goes around the outside, and we laid the 4 by 4's on top of that water main to support it.

Q. Fine, all right, and then you proceeded to put the planking down?

A. Yes, we used 2 by 12-s on top of that, running parallel to the 4 by 4's, and then placed plywood decking on top of the 2 by 12's.

Q. Now, Mr. Blanchard testified there was a railing placed by you fellows on the back of the scaffolding, on the side of the outer wall and down this side—

Mr. Mott: Just a minute, if it please the Court, I think that's a leading question. If he is going to ask him what he put there, that's certainly proper.

The Court: Objection sustained.

Q. All right, I will just ask it this way. Where did you put the railing on the scaffolding?

A. We put the rail along the outside of the concrete cylinder, also along—which would be the west side of the scaffold.

Q. Counterweight No. 2 is on the west side?

A. On the Quad II side.



Q. Now, how far down did you put the railing?

A. Approximately three feet from the crib itself.

[fol. 40] Q. Did you bring it all the way down to the wall of the crib?

A. No, we were told to leave an opening for the craft men to leave the scaffold to reach the counterweight.

Q. I see. Where were you told to leave this opening?

A. Exactly where the picture shows it.

Q. And was it Mr. Imel that told you that?

Mr. Mott: He didn't say that. That's a leading question.

The Court: Objection sustained.

Q. Who was it that told you that?

A. Wayne Imel, carpenter foreman.

Q. Now, Mr. Keenan, was this scaffold as safe as it could have been?

Mr. Mott: Just a minute, we certainly object. That calls for an improper conclusion.

The Court: The objection is sustained.

Q. Can you tell me why, Mr. Keenan, the railing was built as it was on the Quad II side and not on the Quad III side? Do you know that?

Mr. Mott: Objected to as being asked and answered.

The Court: The objection is overruled. You may answer this question.

A. Will you repeat that question, please?

Q. Yes, do you know why the railing was built as it was on the Quad II side and on the back of the scaffold, but not on the Quad III side?

A. The only way I can say is because evidently we did not have time to put it there.

Q. Now, did you understand what the purpose of the scaffold was going to be?

A. Yes.

Q. And what was that?

A. So that the other crafts men could align the pins with the counterweight.

Q. I see. Did you understand that in order to do that they had to actually get out onto the counterweights?

A. Yes, sir.

[fol. 41] Q. Can you tell me why the opening on the Quad II side was not prepared at a point directly opposite the counterweight?

Mr. Mott: Objected to as being asked and answered. He said he put it where he was told to put it.

The Court: Objection sustained.

Q. Mr. Keenan, if you had your choice in the matter, would you have put that opening in another place?

Mr. Mott: Objected to as being absolutely immaterial.

The Court: Objection sustained.

Q. What would you have done, had you had your choice?

Mr. Mott: Same objection, if it please the Court.

The Court: Objection sustained.

Q. Mr. Keenan, what was underneath the scaffold?

A. Directly underneath the scaffold, sir?

Q. Yes.

A. Lot of air. Nothing, sir.

Q. Can you tell me what the prescribed method was for getting from the scaffold to the counterweight on each side?

Mr. Mott: Objected to as being outside the scope of this witness' knowledge. As I understand, he left before the work was started, before the millwrights came. It will be beyond his information that way as to what other workmen were supposed to do.

The Court: Yes, the objection is sustained.

Mr. Kripke: I have no further questions of this witness, Your Honor.

Cross examination.

By Mr. Mott:

Q. Mr. Keenan, what time did you come to work on August 3, 1961?

[fol. 42] A. Well, they were changing shifts back and forth, but I believe it was either 3:30 or 4:30, sir.

Q. What time did you commence the work that you did on this platform you just described?

A. Right before dinner. That would be about 6:30, I believe, sir.

Q. How long had you been working at the missile site there prior to this?

A. Approximately a month and a half.

Q. Was your work at the time the accident happened here in August of 1961 confined to this one particular silo, or did you move around from silo to silo or what?

A. We moved around from silo to silo.

Q. And your foreman was Mr. Imel?

A. Yes, sir.

Q. And you were working in that area as a carpenter, is that right?

A. Yes, sir.

Q. When the Martin Company—did Martin Company have people around there that you knew or saw?

A. At the immediate time, I don't know if there was or not.

Q. Well, no, just generally.

A. Yes, sir.

Q. When they asked you to put something up, you would put it up, didn't you?

A. Well, no, sir. We received our instructions from the carpenter foreman.

Q. That would be Mr. Imel?

A. Yes, sir.

Q. Had you done any work in that particular area there where this platform was on that date prior to about 6:30 when you did the work you have just testified about?

A. No, sir.

Q. Well, had there been a platform of some kind in that area when you started your work?

A. When I got to the place where we were to build that scaffold, if there was another scaffold there it was taken out.

Q. Nothing was there when you got there?

A. Right.

Q. So, you started from scratch?

A. Yes, sir.

Q. Mr. Imel was there when this platform was being built, wasn't he?

A. Yes, sir.

Q. Also the millwright foreman?

A. I believe he was, sir.

Q. Do you remember his name?

A. No, sir.

Q. He stayed right there while it was being built, didn't he?

A. I believe he did, sir.

Q. And then when you got through, the millwright foreman told you it was okay, didn't he?

A. He did not tell me that, sir.

[fol. 43] Q. At any rate, you left after it was finished, didn't you?

A. We went to dinner, yes, sir.

Q. The scaffold or the platform had been checked before you left, hadn't it?

Mr. Kripke: I don't think that's a specific enough question. Checked by whom?

Mr. Mott: I just asked if it had been checked by somebody before he left.

The Court: You may answer. If he knows.

A. I have to say I do not know. I do not remember.

Q. As a matter of fact, you don't leave work like that until it is checked, do you?

A. Normally not.



Q. And that was the case here, wasn't it, Mr. Keenan?

A. I have to repeat the answer to the question before last. I do not remember.

Q. Do you remember making a statement on February 24, 1963, about this accident?

A. What was that date?

Q. February 24, 1963.

A. To whom did I make a statement, sir?

Q. I don't know. To somebody in Colorado Springs.

A. What statement did I make?

The Court: He asked you if you remembered.

The Witness: Do I remember making a statement?

The Court: Yes.

The Witness: To somebody who came to my home, a lawyer or a representative?

Q. I believe so.

A. Yes, there was a man who came to my home and asked me to make—it wasn't exactly a statement, but he wanted me to review.

Q. And you talked to him about what happened out there on August 3, 1961, did you not?

A. Yes, sir.

Q. And he wrote down what you were talking about?

A. Yes, sir.

[fol. 44] Q. And after you got through, you read it, didn't you?

A. Yes, sir.

Q. And you signed it?

A. I believe I did, sir.

Q. And didn't you say this, "Foreman Imel was right there when we got through and he checked the scaffold and we checked it, too. There were several men around and we were told the scaffold was all right, so we went to lunch."

Mr. Kripke: Just a moment, Your Honor, this is an improper way to get hearsay into the case, what somebody told somebody.

The Court: Well, the last part of it, what you read, would be hearsay, but the first part would not. So, the last part—

Mr. Kripke: My objection only goes to the last part.

Mr. Mott: He testified—

The Court: Just a minute, let the Court rule. The objection is sustained as to the last part of the statement that counsel read, of which the tenor was, "We were told—" that's stricken from the record, ladies and gentlemen.

All right, now, Mr. Mott, you may proceed.

The Witness: Are you waiting on an answer from me, sir?

Mr. Mott: No.

The Court: No.

Q. You were not present when the accident happened, were you?

A. No, we were eating lunch.

Mr. Mott: I have no further questions.

Redirect examination.

By Mr. Kripke:

Q. Mr. Keenan, were you told by Mr. Imel or by anybody else what clearance to provide between the platform and the counterweights?

[fol. 45] Mr. Mott: Objected to as far as "by anybody else," if it please the Court.

Q. Were you told by anybody?

Mr. Mott: Same objection. That was the question that I mentioned.

The Court: The objection is sustained. You may ask him if he was told by Mr. Imel. He has testified Mr. Imel was the foreman.

Q. All right, were you told by Mr. Imel what clearance to provide between the counterweight and the scaffold?

A. No.

**Q.** So that the clearance then that was the final route was whose decision? Who was it that decided?

**Mr. Mott:** Objected to if he wasn't told by Mr. Imel. We are getting into hearsay again, if it please the Court. They are asking him for a decision that somebody made out of his presence.

**The Court:** You may ask him if he knows, and then if he answers that affirmatively, then the following question.

**Q.** Do you know whose decision it was to build the scaffold in the dimensions that it was built?

**A.** I believe it would go back to the millwright foreman, sir.

**Q.** Do you know that of your own knowledge?

**Mr. Mott:** Objected to as being asked and answered. Cross-examining his own witness now.)

**Mr. Kripke:** Well, we are trying to find out what the basis of the knowledge is.

**The Court:** Yes, that's right. Do you know that of your own knowledge?

**A.** Repeat the question, please.

**Q.** Do you know that of your own knowledge?

**A.** That the millwright foreman told—

[fol. 46] **Q.** Yes, are you talking about a conversation that took place in your presence or something?

**A.** No, I did not hear the conversation.

**Q.** You didn't hear any conversation?

**A.** No.

**Mr. Kripke:** Your Honor, I am going to ask that that be stricken with reference as to who made the decision.

**Mr. Mott:** I don't think it is proper to have his own witness' testimony stricken, Your Honor.

**The Court:** No, the answer will stand.

**Q.** Now, it is my understanding that your work was done at the request of Mr. Imel, is that right?

**A.** Yes, sir.

54  
Q. And it was his orders you were following in the size of the scaffold?

A. Yes, sir.

Q. And any conversation that somebody might have had with him was outside of your presence?

A. Yes, sir.

Q. Now, do you recall what time the lunch hour was that night?

A. It must have been right at 6:30, sir. If you would give me the time that the accident occurred, I could give you more accurate time.

Q. If the accident occurred at 7:45—

The Court: Well, just a moment. The questions will come from counsel, not from the witness.

Q. You believe your lunch hour was around 6:30?

A. Yes, sir.

Q. Do you recall whether you worked on the scaffold after lunch?

A. No, we did not.

Q. Had you returned from lunch at the time this accident happened?

A. No, about fifteen minutes after we started eating, we were informed of the accident.

Q. I see. Was the scaffolding completed at that time?

A. Yes, sir, it must have been.

Q. It was completed as far as it was going to be built?

A. Yes, sir.

Q. Then, there was no intention, or you had not been told, to complete the railing, is that right?

[fol. 47] Mr. Mott: Objected to as a leading question.

The Court: Objection sustained.

Mr. Kripke: That's all.

Mr. Mott: I have no further questions. Oh, I am sorry.

By Mr. Kripke:

Q. Mr. Keenan, could your lunch have been at 7:30, rather than 6:30?



A. Like I said before, I wasn't sure if we started at 3:30 or 4:30. If we started at 4:30, it would have been 7:30.

Q. So your lunch would have been 6:30 or 7:30, depending on what time you started?

A. Yes, sir.

BRUCE WILHOIT called as a witness by the plaintiff, having been first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Kripke:

Q. What is your name, please?

A. Bruce Wilhoit.

Q. Your address, sir?

A. Middletown, Ohio.

Q. Your occupation?

A. Millwright.

Q. What was your occupation on August 3, 1961?

A. Millwright.

Q. How long have you been a millwright?

A. Fifteen years.

Q. Can you tell me what a millwright is, what he does?

A. A millwright sets lines and levels machinery. He is a machinery erector.

Q. And by whom were you employed on August 3, 1961?

A. Morrison-Knudsen.

Q. Can you tell me exactly what your job was?

A. On that date?

Q. Well, no, just generally what was your job?

A. Generally was lining and leveling and setting machinery on the site.

Q. This was at Missile No. 2?

A. That's right.

Q. Or Silo No. 2 out there at Elizabeth?

A. That's right.

Q. Now, on the day, on August 3, 1961, what was your job?

A. My job was to check and lock clearance parallel with the actual lock itself going into the counterweight.

[fol. 48] Q. Can you explain to the Court and Jury what you were doing or what you were about to do and so forth?

A. The counterweight lock is in the counterweight itself, the hole for the lock. I could explain it with a picture, if you—

Q. Let me hand you Exhibits 1, 2, 3 and 5. With the use of these pictures, can you better explain it?

A. Yes.

Q. All right.

A. With Picture 1, I was checking the hole in the counterweight for the lock to enter. We were taking the dimensions with a plumb bob from the lock itself to the edge of the hole, checking the inside diameter of the hole to the outside of the lock, to make sure everything would click before the operation continued to lock again.

Q. What kind of instruments were necessary to measure this type of thing? \*

A. We had inside mikes and a set of outside mikes.

Q. A mike is a micrometer?

A. A micrometer.

Q. These then were very precise instruments?

A. Yes, sir.

Q. Were inches or a fraction of an inch used?

A. Thousandths.

Q. Thousandths of an inch?

A. Yes.

Q. Where were the counterweights with reference to the top of the silo at that time?

A. I would say between six to seven foot below.

Q. Who were you working with on that operation?

A. Mr. Gary Neely and Mr. McCoun, Tom Bowen, which was my foreman, and I mean that was actually the people that I was actually working with.

Q. Had you already begun the measurements before this accident occurred?

A. Already begun before?

Q. Yes.

A. Yes, we had.

Q. Where had you been?

A. We had been on the opposite counterweight. I believe this would be the west counterweight there, the way it is from here.

Q. I see. Can you see the diagram that Mr. Blanchard drew on the board earlier?

A. Yes, sir.

Q. Can you orient yourself on that?

A. Yes, sir.

Q. Would it be this counterweight closest to Roman Numeral III?

A. Yes, sir.

Q. Who had been out there and what had you been doing? [fol. 49] A. Myself, McCoun and Mr. Neely and Mr. Bowen was on the counterweight. Mr. McCoun and myself were taking the measurements. Mr. Neely was writing them down and checking them as we were taking them.

Q. Was this his job?

A. Yes, it was.

Q. How did you folks get from the scaffolding to the counterweight?

A. I came from the scaffolding across the cribbing on the inside of the crib, crossed and jumped over to the counterweight.

Q. How did the others come?

A. Probably the same way, but on this side you could jump either right off of it, right onto the counterweight.

Q. On this side of the platform?

A. On this side of the platform.

Q. Why was that?

A. There was no railing there.

Q. Were there any railings on that platform?

A. Yes, there was a railing in the back, facing the—the wall, the silo wall.

Q. Back here?

A. Yes, sir, and a railing running this way.

Q. How far down?

A. Approximately, oh, three-quarters of the scaffolding.

Q. Then, after you completed your measurements on No. III, tell us what transpired, what took place.

A. I proceeded from No. III up onto the scaffolding, walked across the scaffolding, stepped up onto the crib steel, finished walking across the crib steel, jumped over onto the top of the counterweight.

Q. That's onto this counterweight?

A. That counterweight.

Q. I see.

A. The counterweight has a recess in it to where I—

Q. Can you show that to the Jury, so the Jury will know exactly where you were at that moment? You can step out of the witness box and show them more closely.

A. I jumped from the crib steel, which is here, to this point, and then I proceeded myself to get into the hole in the counterweight.

Q. All right, thank you. Then do you recall the sequence of events which followed?

A. Yes, very well.

Q. Will you please tell us?

A. After I proceeded into the hole, I took hold of the cables that is coming into the counterweight with my right hand. I turned for a minute to see if my buddy and Mr. [fol. 50] Neely were coming over at that time to help with this one, if they were ready. Just as I turned, I saw Mr. Neely coming across the scaffolding, and I didn't keep an eye right on him at the time. I just looked to see if they were coming. I took my safety belt and snapped it around, which it has a cable on it, snapped it around the cables and snapped it on my other side. Just as I did that, I just happened to glance up and saw Mr. Neely coming head first by the counterweight. With my left hand I made a grab and grabbed the back of his shirt. With a sudden jerk his shirt flipped out of my hand and he proceeded on down.

Q. Did you see him go on down?

A. Yes, sir, the whole way.



Q. Would you describe his fall?

A. He went down past the counterweight, made a slight turn. His head or hands hit, I would say approximately 25 foot down. He made one complete turn in the air, proceeded on down farther, which distance looking down you can't describe in feet. His feet hit in the back on the rail, in one of the rails. His shoe came off. He turned half over again and went, proceeded down farther, and hit his head. His head hit. He turned face up, looking straight up in the hole, and hit flat in the bottom.

Q. Do you know how far he fell?

A. I would say 120 feet.

Q. Now, Mr. Wilhoit, have you worked on scaffolding before?

A. Yes, sir.

Q. To what extent do you have knowledge of scaffolding?

A. Just about every job has some on it. In years of experience, probably fifteen years of scaffolding.

Q. Would you be in a position to be able to express an opinion as to whether a specific piece of scaffolding is inadequate or improper in any way?

Mr. Mott: Objected to. At this point, I understand the answer to be yes or no, nothing else.

The Court: Yes, that's right. You answer yes or no.

A. Yes.

Q. Would you express that opinion?

Mr. Mott: We object as being outside of the scope of the issues in this case and irrelevant.

The Court: The objection is sustained.

[fol. 51] Mr. Kripke: I am afraid I misphrased my question. Let me ask this another way for the purpose of the record.

Q. Are you in a position to pass an opinion as to this specific scaffolding in this silo on August 3, 1961?

Mr. Mott: Object to that, if it please the Court. The Court has already ruled this is not a subject for this opinion.

A. Yes.

Q. What is that opinion?

Mr. Mott: We object.

The Court: Now, the objection is sustained.

Mr. Kripke: Your Honor, that's on the same ground as the previous one?

The Court: Yes.

Q. Can you tell me how far it was, Mr. Wilhoit, from the place where the scaffolding met this beam to the nearest corner of the counterweight.

A. I would say approximately two foot.

Q. And now, that would be on a level?

A. That's right.

Q. Now, was the counterweight level with the platform at that time?

A. No, it wasn't.

Q. What then would have been the direct line distance from that corner to the corner of the counterweight, as it existed at that time? That is, down?

A. I would say approximately three and a half foot.

Q. Was there anything between that point and the floor of the silo to break Mr. Neely's fall?

A. No, sir.

Mr. Kripke: I have no further questions, Your Honor.

Cross examination.

By Mr. Mott:

Q. I believe you stated, Mr. Wilhoit, that you were a millwright at the time this accident happened?

A. Yes, sir.

Q. And that you were working for Morrison-Knudsen?

A. Yes, sir.

[fol. 52] Q. I believe you mentioned two men with whom you were working, Mr. McCoun and Mr. Bowen.

A. That's right.

Q. Do you recall Mr. Haven?

A. Not right off. Not working with me directly, no.

Q. You don't think he was working with you on this day?

A. He was on the job that day.

Q. Also Mr. Usselman?

A. Frank Usselman was my general foreman.

Q. Did you say a minute ago—I may have misunderstood you, Mr. Wilhoit, but Mr. Boyles being your foreman?

A. Mr. Boyles, Mr. Tom Boyles, was my foreman. Frank Usselman was my general foreman.

Q. And all of you worked for Morrison-Knudsen?

A. Yes, sir.

Q. Mr. Neely, you understand, was not an employee of Morrison-Knudsen?

A. That's right.

Q. And do you know who he was employed by?

A. S & P, as far as I know.

Q. Now, were you working in this particular silo the entire day prior to the time the accident happened?

A. Yes, sir.

Q. What levels have you worked at?

A. I had worked at the drive level.

Q. Which is the drive level?

A. Which is just above the platform, just above the scaffolding.

Q. Is that all?

A. I was assigned to that area with Mr. Neely.

Q. What time did you get there then?

A. I was on the job approximately a quarter to four.

Q. And what did you do between a quarter of four and the time that you went out to make these measurements?

A. We stood by on the drive, preparing for the operation to begin.

Q. When you say "we," "We stood by on the drive," who do you mean?

A. Mr. McCoun, myself, and Mr. Neely, and which Mr. Neely was busy. He was in charge of the operation. And,

Mr. Bowen my foreman, and I don't know if Frank, the general foreman, was there all the time or not.

Q. And would that be—where were you standing, would that be up in the neighborhood of where this "1" with the circle around it is?

A. Yes.

Q. The persons you have mentioned stood there in that area for how long before you started making measurements? [fol. 53] A. I suppose we were there approximately three hours or better.

Q. When you first got there, was there any platform or scaffolding in the area between the two counterweights up there at the level where you were?

A. I think they had been removed on the day shift.

Q. Was Mr. Blanchard there, too?

A. At the time or before.

Q. Before.

A. Yes, he was.

Q. And you heard him give the order to put this platform in, did you not?

A. No, sir, I never.

Q. You were there when the platform was being put in, were you not?

A. Yes, sir.

Q. And you could watch the carpenters while they were working?

A. If I wanted to.

Q. And was Mr. Neely there all that time?

A. Yes, sir.

Q. And it is true, is it not, that none of the millwrights put this platform in?

A. None.

Q. And later on, the carpenters left, did they not?

A. Yes, sir.

Q. And they were told that they were through?

A. You mean—that would be beyond my knowledge whether they were told they were through or not.

Q. At least, they left.



A. They left.

Q. And somebody gave you an order to go out there and start measuring, didn't they?

A. Yes, sir.

Q. Who was that?

A. Mr. Bowen.

Q. Is that Boyles or Bowen?

A. I think it was Bowen. I think Tom.

Q. His first name was Tom?

A. Tom Bowen.

Q. He was your foreman, is that right?

A. Yes, sir.

Q. Was Mr. Usselman around, too?

A. I couldn't say.

Q. At any rate, Mr. Boyles told you to go out and start making measurements, is that right?

A. That's right.

Q. And then you proceeded, did you not, to this platform?

A. Yes, sir.

Q. And who went down onto the platform with you?

A. Mr. McCoun, Mr. Bowen and Mr. Neely.

Q. What about Mr. Haven? Wasn't he there, too?

A. I mean, he could have been there, but not on the platform with us. There was not that much room on the platform.

Q. And then you yourself, did you not, moved from the platform over here to what we call the No. III counterweight?

A. Yes, sir.

[fol. 54] Q. And who else went out onto the counterweight with you?

A. Mr. McCoun and Mr. Bowen and Mr. Neely.

Q. Isn't it true that Mr. Neely stayed on the platform?

A. No, sir.

Q. Now, how many of you do you say were on that counterweight on the third quadrant?

A. On the third quadrant or first quadrant?

Q. Well, I call this the third one.

A. Oh, that's fine. How many? There was four of us.

Q. And that would be you—

A. Mr. McCoun and Mr. Neely and Tom, the foreman, and Frank, the general foreman, was not there.

Q. And Mr. Neely had a note book with him?

A. Yes, sir.

Q. Was that on a metal pad or wooden pad?

A. It was a small black notebook.

Q. And he stood on the counterweight with the other three of you?

A. Yes, sir.

Q. And the three of you made the measurements?

A. Myself and Mr. McCoun and Mr. Neely.

Q. Mr. Neely actually got down and made the measurements?

A. No, sir, myself and Mr. McCoun made the measurements. Mr. Neely checked our measurements.

Q. And wrote them down?

A. And wrote them down.

Q. Was he standing or sitting when he was writing these measurements down?

A. He would have to stand.

Q. And I assume from what you said you completed the measurements on the third quad.

A. Yes, sir.

Q. Then, did all four of you move from the third quadrant counterweight to the platform?

A. Not just—one at a time went across. We all moved to the platform. That was the way to get to the other quadrant.

Q. Who was the first one to leave the platform for the second quadrant?

A. I was.

Q. And who was right behind you? Mr. McCoun?

A. Mr. Neely.

Q. Mr. Neely and then Mr. McCoun?

A. I believe it was Mr. McCoun.

Q. And then who?

A. I would assume that Mr. Bowen would have been the fourth one.

Q. Now, you say that you got from the platform to the counterweight by stepping from the platform to the I-beam?

A. Yes, sir.

Q. Could you show on the exhibit here, on Exhibit No. 1, and speak up, she has to write it down—would you show the Jury? This is the platform here?

A. That's right.

[fol. 55] Q. That's just the way it was?

A. That's right.

Q. It has a "B" written on there. You can see it. We had an awful time with the pen, I believe.

A. I see.

Q. Now, would you show the Jury—you had your feet on this platform, is that right?

A. Yes, sir.

Q. Then you stepped where?

A. As I stepped into the structural steel; into the crib steel here.

Q. Would you put a mark, an "O"?

A. I will put the "O" and an arrow. (Witness writing on diagram.)

Q. All right, sir, would you step up here? As I understand, you stepped from this platform here, is that right?

A. Yes, sir.

Q. And you stepped onto this I-beam, where you have marked an "O" and an arrow?

A. Yes, sir.

Q. You stepped down onto the counterweight?

A. I probably made another step in the I-beam and got ahold of the cable and jumped into the counterweight.

Q. You say the counterweight was about two feet below the platform?

A. Probably.

Q. That would be two feet below from the counterweight in the picture?

A. Yes, sir.

Q. You also say the edge of the platform was about two feet from the edge of the counterweight?

A. Yes, sir.

Q. Then, when you got down into the counterweight, did you step in this area that's recessed?

A. There is an area in here that's recessed, a bigger area than this. This is the lock. There is an area in here recessed, which is in this photograph, in No. 2, and in this area.

Q. How far was the cable here from the I-beam, the cable that appears in Exhibit 1?

A. Approximately  $2\frac{1}{2}$  feet.

Q. So you had to reach out about  $2\frac{1}{2}$  feet and hang onto the cable, is that right?

A. Yes, sir.

Q. And then from the cable you got to the counterweight?

A. Got to the counterweight, to the top of the counterweight, and then stepped into the recess.

Q. When you stepped into the recess, did you then let go of the cable?

A. With one hand. I let go of the cable and grabbed this cable here with my right hand.

Q. Which is the cable that you hung on to on the way over?

A. This cable here, I never hung onto it on the way over. I just walked across and just got ahold of it as I was going across, just to balance.

[fol. 56] Q. But, then, your hand on the cable went down after you went into the recess?

A. Yes, sir.

Q. Thank you. What kind of shoes were you wearing?

A. I was wearing what we call a wedge boot.

Q. What kind of soles do those have?

A. A flat sole, no heels. It is on a sponge type sole, Neolite sole. It was a sponge type sole, wedge sole.

Q. Did you notice what kind of shoes Mr. Neely was wearing?

A. No, sir, I never.



Q. Now, it was right after you got into the recess of this counterweight, wasn't it, that you saw Mr. Neely falling?

A. I was in the counterweight. When I got to the counterweight, I looked back to see if they were coming.

Q. And at that point, Mr. Neely was still on the platform?

A. He was coming across the platform then. I took time to hook my safety belt around this cable. I hooked my safety belt. I turned. Mr. Neely was heading face down, coming at me, which not completely vertical, but he was falling. His feet were coming off the platform, and he was just, say, in a dive.

Q. What I was getting at, when you first got over to the counterweight—we are not talking about the one where you were when the accident happened. When you first got over to the counterweight, you turned back and saw Mr. Neely still on the platform?

A. He was coming up on the platform behind Mr. McCoun. I mean, in front of Mr. McCoun.

Q. He was still on the platform?

A. Yes, sir.

Q. He didn't have his hand on that railing or anything, did he?

A. No, sir, there is no railing there.

Q. Well, I am talking about the railing that's in this Exhibit No. 1, this railing here, upright I guess you call it.

A. When I got the counterweight and seen him, he was just coming up on the scaffolding on the other side where there was no railing. He hadn't—

Q. He hadn't walked across to the edge that appears in this picture, No. 1?

A. No, sir.

Q. All you saw was him walking across, and you turned your back, and the next thing you saw he was coming down?

A. I saw him coming down.

Q. You could see where you were going in this area, couldn't you?

A. Yes, sir.

Q. This platform didn't break at all, did it?

A. No, sir.

Q. That upright didn't break or anything?

A. No, sir, not to my knowledge.

[fol 57] Q. Did you see Mr. Blanchard at any time between the time they started making the platform and the time of the accident?

A. No, I never.

Q. You didn't get onto the platform until the carpenters left, did you?

A. No, sir.

Q. You were told to go out there by your foreman?

A. That's right.

Q. Did Mr. Neely have the notebook in his hand when you last saw him before he fell?

A. I couldn't say.

Q. But he did have a notebook or whatever you call it when you were measuring on No. 3?

A. Yes.

Mr. Mott: I have no further questions, thank you.

#### Redirect Examination.

By Mr. Kripke:

Q. Mr. Wilhoit, I want to direct your attention to that same picture on which you just drew. Oh, I see. Would you mind stepping before the Jury once more, sir?

Now, am I right in saying that the spot you drew is quite close here to this 4 by 4?

A. Yes, sir.

Q. Now, there are a number of black spots to the outside of that, would be to the west.

A. Yes, sir.

Q. To the west of that. Do you know what those spots are?

A. No, I don't.

Q. Was there any grease in the place?

A. No, sir.

Q. This was not grease?

A. No, not grease.

Q. Now, Mr. Wilhoit, why didn't you go directly to the counterweight No. 2, rather than go—why didn't you go directly across?

Mr. Mott: Object to that. I think he described how he went, and the reasons I don't think are material, if it please the Court.

The Court: The objection is sustained.

Q. Mr. Mott asked you, established on cross-examination that the millwrights did not put the platform in. That's right, isn't it?

A. That's right.

Q. This was the carpenters who put the platform in?

A. That's right.

Q. Do you know why the millwrights didn't put the platform in?

A. Because—

[fol. 58] Mr. Mott: Objected to as immaterial.

Mr. Kripke: Counsel asked the question. I am just asking why.

The Court: All right, objection overruled. You may answer if you know.

A. (Continued) It is not our work.

Q. Can you tell us about how that works between crafts?

A. It takes in an awful big area, but millwrights do no carpenter work whatsoever.

Q. Mr. Wilhoit, was there any other way to get from the platform to Counterweight No. 2?

Mr. Mott: Objected to. It is the same question all over again. I think the pictures speak for themselves. He said they had to step down on there from the platform to the counterweight.

The Court: I am going to permit him to answer the question. You may answer the question.

A. There—you would have to—

The Court: No, he just asked you if there was any other way to get to the counterweight. You can answer yes or no.

A. Yes.

Q. What other way?

A. You could come across the platform onto the steel, as I did, or they had—the railing was cut where there was an opening that you could have went through, where I went through, and stepped onto the structural steel. The only other way would be to climb over a rail.

Q. To climb over the railing that was there?

A. Or either go back up into the drive section and jump down from there, which was a lot farther than the actual way they had built to go.

(Plaintiff's Exhibits 7 and 8 were marked for identification.)

[fol. 59] In Open Court

The Court: All right, Exhibits 7 and 8 will be received.

(Plaintiff's Exhibits 7 and 8 for identification were received in evidence.)

Mr. Kripke: Your Honor, we have had a Polaroid photograph marked as Plaintiff's Exhibit 10, and I now offer it into evidence.

This is a photograph of the blackboard.

Mr. Mott: We have no objection.

The Court: The exhibit will be received in evidence.

(Plaintiff's Exhibit 10 for identification was received in evidence.)



Mr. Kripke: Your Honor, subject only to the matter of the introduction of the Mortality Table, the plaintiff rests.  
 The Court: All right.  
 In Chambers.

**MOTION FOR INVOLUNTARY DISMISSAL OR FOR A  
 DIRECTED VERDICT AND DENIAL THEREOF**

Mr. Mott: At this time, now that the plaintiff has rested his case or her case, and proposes to offer no further evidence, the defendant moves for an involuntary dismissal of this action or for a directed verdict, whichever term the Court may determine appropriate, at this stage of the proceedings, for the following reasons: (1) There is no evidence of any negligence on the part of the defendant which proximately caused the accident in question.

(2) There is no evidence that anything that the defendant did or failed to do proximately caused the accident complained of.

(3) There is no evidence that the defendant breached any duty owing by it to plaintiff's decedent at the time of the accident.

[fol. 60] (4) It is uncontroverted that at the time of the accident the work done by the defendant had been completed and accepted by Sverdrup & Parcel or by Morrison-Knudson, or both.

(5) That even if any negligence be assumed at the outset, plaintiff's decedent was obviously guilty of negligence or contributory negligence as a matter of law, since the area in question was open and obvious and since there is in evidence no evidence of any hidden defect or situation of that type.

Now, that's the formal motion, if it please the Court, and I would like to make this statement at this time. In view of the complete lack of evidence that the plaintiff has put on at this stage of the proceedings, it is our present inten-

tion not to offer any further evidence, and for that reason I would like to make my complete motion at this time.

(Mr. Mott presented argument on the motion. Mr. Friedman presented argument on the motion. Mr. Mott presented rebuttal argument. Mr. Kripke presented argument.)

The Court: The Court feels in this case that the plaintiffs do not have a very strong case as far as the evidence is concerned.

Nevertheless, I do not think it proper to direct a verdict unless there is absolutely no evidence whatsoever which would sustain a verdict in favor of the plaintiff.

Now, I don't recall the evidence with the same degree of positiveness that counsel for the defendant apparently does, with particular reference to the acceptance of the work on the part of the millwrights. That is, the work in modifying the platform or the scaffolding.

Even if the millwrights had accepted it, there certainly is no evidence that Sverdrup & Parcel accepted it, and this is the subcontractor who was the employer of the deceased.

Now, I don't say that my recollection of the testimony is more accurate than counsel. This is a matter that the Jury will have to determine, what the evidence is in the case.

And, going a little further, I state this so that counsel will know my feeling in not only this case but other cases. I [fol. 61] don't think that the Federal Government is bound by the same procedural practices as the State Supreme Court. We are bound by the substantive law of the State in this case, but whether or not a directed verdict will be given is a matter where we follow—I like to think we follow what the Federal Courts have decided in these cases, rather than the State Courts, and it has been my experience and understanding that the Federal Courts look with more disfavor on directed verdicts for two reasons.

One is that, of course, there can be a motion—we will assume that the plaintiff recovers here—there could be a motion notwithstanding the verdict made, motion for judg-

ment, for the defendant, notwithstanding the verdict, and the Court, of course, would consider that after the trial; and would have an opportunity to reflect more on the factual situation and the legal situation as presented.

Secondly, assuming that the Court makes a mistake, even then, and the case goes to the Court of Appeals, if there had been a verdict in the favor of the plaintiff in this case, then the case would not have to be retried. The verdict would merely be reinstated, and it says. It is a procedural matter. It is not a gimmick. It makes sense to me in close cases, and this is what I think this is.

As I said at the outset, I don't think the plaintiff has a strong case at all here. It is pretty weak. I am not critical of counsel. I mean, the factual situation.

Mr. Kripke: Yes, I understand.

The Court: I think that counsel presented everything they had, but, nevertheless, it is my belief that this Court should be absolutely and positively convinced that under no interpretation of the facts that are in evidence would the plaintiff be entitled to recover for the Court to take it away from the Jury entirely and say, "You are instructed to find for the defendant," and I merely add it in these last remarks because I don't think that our procedure necessarily follows or should necessarily follow the State procedure in this on this point, because we do have adequate procedural tools to remedy a situation if a mistake is made here, and particularly in the latter one. I think Moore—I am sure some of the authors discuss this matter. I [fol. 62] think Moore does, that as I said here, particularly where the defendant has indicated he will offer no evidence, so there will not be a burdensome record here, expensive additional testimony to be elicited, and a record made for review in the Appellate Court in the event that becomes necessary.

Of course, the question may be moot after the Jury comes in, so the Court is going to deny the motion as made in the alternative.

## In Open Court

(The following proceedings were had in the presence of the Jury.)

WAYNE IMEL called as a witness by the defendant, having been first duly sworn, on his oath testified as follows:

### Direct Examination.

By Mr. Mott:

Q. Would you state your name, please.

A. Wayne Imel.

Q. Where do you live, Mr. Imel?

A. 6250 North Federal.

Q. What is your present age?

A. Forty.

Q. Would you speak up so the Jury can hear you, please?

What is your occupation, Mr. Imel?

A. Carpenter foreman.

Q. And who are you employed by at the present time?

A. Eby Construction Company.

Q. How long have you worked for Eby?

A. About seven years.

Q. Has all of that been in Colorado?

A. No.

Q. How long have you lived in Colorado?

A. Approximately three years.

Q. Mr. Imel, who were you working for in the month of August, 1961?

A. Eby Construction Company.

Q. And where were you working for Eby at that time?

A. Out here at 2-C missile site, by Elizabeth, Colorado.

Q. And what was your job on that missile site?

A. I was the carpenter foreman on the swing shift.

[fol. 63] Q. Do you recall how long you had been working at that missile site prior to August 3, 1961, approximately?



A. I believe I started out there approximately in April.

Q. Now, are you familiar with an accident which happened on August 3, 1961, involving Mr. Gary Neely?

A. Yes, I am.

Q. Were you present when the accident actually happened, Mr. Imel?

A. No.

Q. Where were you when you heard about the accident?

A. I was down in one of the AT's eating.

Q. Eating?

A. Yes, eating.

Q. What had you done just before you went to eat?

A. I had built a scaffold for them to work off of.

Q. Where did you build this scaffold?

A. It was in Silo No. 2, up approximately to the top of it, between two of the counterweights.

Q. Besides yourself—strike that. Did you actually participate in the work yourself?

A. No, I didn't. I supervised it.

Q. Were you there all the time it was going on?

A. Yes.

Q. Was anyone there besides—well, strike that. You supervised who, the carpenters?

A. Yes.

Q. Was there anybody there besides the carpenters while the work was going on?

A. There were several people around, but I don't know just exactly what their names were and what their jobs were. There was several people watching.

Q. Do you know a man by the name of Blanchard?

A. Yes, I do.

Q. Was he present, if you know, when you started to work?

A. He was present when we started, yes.

Q. Was he present when you finished?

A. Yes.

Q. Did you tell him you were going, leaving?

Mr. Kripke: Just a moment, the plaintiff, Sandra Neely, objects to any conversation which took place between this

gentleman and Mr. Blanchard or anybody else outside of the presence of Gary Neely.

Mr. Mott: If it please the Court, they have called this Mr. Blanchard as a witness.

Mr. Kripke: On the grounds of hearsay.

Mr. Mott: It is not hearsay.

[fol. 64] The Court: The objection is overruled. You may answer the question.

The Witness: What was the question?

Mr. Mott: I don't recall the question.

The Court: Will the reporter read it?

(The reporter read the pending question.)

A. Yes.

Q. Was the job finished at that time?

A. To his satisfaction, yes.

Mr. Kripke: May it please the Court, I think that's improper testimony.

The Court: The objection is sustained. The answer is stricken. The Jury is instructed to disregard the last answer.

Q. Did Mr. Blanchard make any statement to you before you left?

Mr. Kripke: If it please the Court, again, this is objectionable on the grounds it is leading, suggestive and hearsay.

The Court: The objection is overruled. You may answer.

Q. Did Mr. Blanchard make any statement to you before he left—before you left?

A. I asked him if he—

The Court: You can answer that question yes or no. Did he make any statement to you before he left? That was the question.

A. (Continued) Before he left or before I left?

Q. Before you left.

A. Yes.

Q. What was that statement?

A. That the scaffold was satisfactory to him.

Q. Where was he when he made that statement?

A. There was a ledge just above us a short ways and he was kneeled down on that ledge.

[fol. 65] Mr. Kripke: May it please the Court, the plaintiff objects to this testimony with reference to this conversation on the ground that this is improper. This is getting in by indirection a statement from Mr. Blanchard when the Court would not permit the plaintiff before to allow Mr. Blanchard's testimony as to his opinion of the scaffolding.

The Court: The objection is overruled.

Q. Did you do any work on the scaffold after that and before you went to supper?

A. I don't quite follow when you—

Q. After Mr. Blanchard made that statement, did you do any more work on the scaffold before you went to eat?

A. No.

Mr. Mott: Thank you.

Gross examination.

By Mr. Friedman:

Q. Mr. Imel, how long have you been an employee of Eby Construction Company?

A. Seven years.

Q. And how long have you been a carpenter foreman?

A. For Eby Construction Company?

Q. For Eby Construction Company.

A. Approximately four or five years.

Q. Do you work out of their local office here in Colorado?

A. Well, yes.

Q. Are you in any way attached to the business office, or are you still a carpenter foreman?

A. I am still a carpenter foreman.

Q. Are you presently working on any work for Eby Con-

struction Company? I don't mean just this time. I mean, at this particular time?

A. Yes.

Q. Are you supposed to be on a construction site?

A. Yes.

Q. On the date of this accident, you said that there were a number of people standing around while you were constructing this scaffold, is that correct?

A. Yes.

Q. I believe you also answered that you didn't know anyone there, is that correct?

A. I knew this Mr. Blanchard, and that was—as far as I can recall, he was about the only man that I knew. I had my dealings with Mr. Blanchard and he was really the only man that I was paying any attention to.

[fol. 66] Q. You had been on this construction site since April of 1961, is that correct?

A. Yes.

Q. This was August of 1961?

A. Right.

Q. Can you tell me in number, if not in name, how many people were standing there watching you?

A. No, I cannot.

Q. Were there five?

A. Yes.

Q. Ten?

A. I cannot tell you.

Q. More than ten?

A. I cannot answer, because I don't know. All I can say is there was a group of people there. Now, whether there was five, ten or fifteen, I can't tell you. There was over five.

Q. Were there carpenters there?

A. I had two carpenters there.

Q. Were there millwright workers there?

A. I can't tell you whether there was or not. Now, who was in the group of people, I did not pay any attention to them.



Q. How many railings were on this scaffold that you said you built?

A. Two.

Q. Is that the usual procedure?

Mr. Mott: Objection as immaterial.

The Court: Objection sustained.

Q. What was the position of the two railings that you mentioned were on this scaffold?

Mr. Mott: Objected to as being outside of the scope of direct testimony, if it please the Court.

The Court: Well, I will permit him to answer the question. The objection is overruled. You may answer.

A. I can't tell you what directions they were, because the directions don't mean anything to me in the silo.

Q. Mr. Imel, am I led to believe that you do not remember the directions of these railings, you do not remember how many people were watching, and you do not remember anyone in this crowd except Mr. Blanchard? Is that correct or not?

Mr. Mott: Objected to. He is asking what he believes.

The Court: The objection is sustained. The question is improper.

[fol. 67] Mr. Friedman: Excuse me just a minute.

(Counsel conferred.)

Mr. Friedman: Thank you very much.

Mr. Mott: We have no further questions.

The Court: You are excused, Mr. Imel.

Mr. Mott: We have no further testimony. The defendant rests, if it please the Court.

## In Chambers

### MOTION FOR A DIRECTED VERDICT AND DENIAL THEREOF

(The following proceedings were had outside of the presence of the Jury.)

. . . . .

Mr. Mott: I want to, at the close of all the evidence, move for a directed verdict for each and every reason given in support of defendant's motion for involuntary dismissal or directed verdict made at the close of the plaintiff's case, and for the further reason that the evidence adduced subsequent to the denial of said motion clearly indicates and establishes freedom of negligence on the part of defendant.

The Court: The motion will be denied.

. . . . .

## In Open Court

(At 2:05 o'clock p.m., the following further proceedings were held in the courtroom in the presence of the Jury.)

### CHARGE TO JURY

The Court: Ladies and gentlemen of the Jury: You have heard all of the evidence in the case and the summation of counsel, and it is now my duty as Judge to inform you what the law is that is applicable to this case.

[fol. 68] You, ladies and gentlemen, are the sole judges of the facts and credibility of the witnesses who have testified in the case, and you shall determine what weight you shall give to the respective witnesses' testimony. However, you are obliged to follow the law as I shall outline it to you, even though the law may be or may seem to be different to you than you believe it is or should be.

In her complaint here, the infant plaintiff states she was born on October 11, 1960, and that Cecile V. Neely is her custodian and legal guardian by order of course.

She further states that she is the only child of Gary Neely, who was killed on August 3, 1961, while working at Missile Silo No. 2, Complex 2-C, near Elizabeth, Colorado, and that she is a citizen and resident of the State of Missouri.

She charges that the death of her father, Gary Neely, was a direct result of the carelessness and negligence of the defendant Martin K. Eby Construction Company, Inc., and of its employees, who were then and there acting in the scope and course of their employment in the erection and maintenance and supervision of a certain scaffold.

She further states she was dependent on him for support and maintenance and as the direct result of the death of her father she has suffered pecuniary loss in excess of \$25,000.

The defendant in its answer admits that Gary Neely was killed on August 3, 1961, while working in the missile silo described above, and the plaintiff is a resident and citizen of the State of Missouri. However, the defendant denies each and every other allegation contained in the plaintiff's complaint, and as an affirmative defense alleges that Gary Neely was guilty of contributory negligence which caused his death.

The foregoing are the issues as presented by the pleadings on file in the court and are not to be considered by you as evidence in the case.

The burden of the proof is on the plaintiff in this case to establish all the material allegations of her complaint by a preponderance of the evidence.

[fol. 69] The burden of proof is upon the defendant to establish his affirmative defense by a preponderance of the evidence.

Now, by burden of proof is meant the obligation resting upon the party or parties who assert a proposition to establish the same by a preponderance of the evidence.

And, by a preponderance of the evidence is meant that which is most convincing and satisfactory to you and which you believe is a truthful account of the matter in contro-

versy between the parties, even though the evidence is elicited from the testimony of the opposing party.

Now, in order for you to reach a conclusion that the plaintiff in this case has proven her case by a preponderance of the evidence, you must feel satisfied in your minds after hearing and weighing all of the evidence that the evidence produced by the plaintiff in this case outweighs the evidence produced by the defendant, and in order for you to reach the conclusion that the defendant has proven its affirmative defense you must feel satisfied in your minds after hearing all of the evidence that the evidence produced by the defendant as to such affirmative defense outweighs that produced by the plaintiff.

You are instructed, ladies and gentlemen, that the mere happening of an accident does not raise any presumption of negligence on the part of either the decedent in this case or the defendant.

A proximate cause of an injury is a cause which in a natural and continual sequence, unbroken by any independent cause, produces the injury, and without which such injury would not have occurred.

Negligence is the failure to exercise for the protection of others the care and caution that would be exercised by an ordinarily prudent person under the same circumstances. The failure to do what an ordinarily careful and prudent person would have done under all the circumstances of the case or the doing of something that an ordinarily prudent person would not have done under all of the circumstances of the case is negligence.

[fol. 70] You are instructed that contributory negligence as it is applied in this case is such negligence on the part of the deceased as helped to produce the injuries complained of, and without which they would not have occurred. Such negligence need not have been the sole cause of the injuries, but merely such that but for the negligence of the deceased they would not have occurred.

The issues to be determined by you in this case are these, ladies and gentlemen:



First, was the defendant negligent?

If your answer is no, then you will return a verdict for the defendant, but if your answer is yes, then you have a second issue to determine.

Namely, was the negligence of the defendant a proximate cause of the injury to the plaintiff?

Now, if your answer to that question is no, you will return a verdict for the defendant, but if your answer is yes, then you should find the answer to the third question.

Namely, was the decedent, plaintiff's father, contributorily negligent?

Now, if you find that he was not, having found in the plaintiff's favor in answer to the first two questions, you should determine then the amount of the plaintiff's damages and return a verdict in favor of the plaintiff and for that amount.

On the other hand, if you find that the decedent, plaintiff's father, was contributorily negligent and that his fault contributed as a proximate cause of any of the injuries which may have been sustained, then you will return a verdict for the defendant.

Now, the defendant, Martin K. Eby Construction Company, a foreign corporation, is a corporation, and as such can act only through its officers and its employees.

Acts and omissions of such employees done within the scope of their authority are in contemplation of law the acts and omissions of the corporation.

[fol. 71] The Court instructs you, ladies and gentlemen, that the defendant was not an insurer of the safety of Gary Lee Neely, deceased, and that the only duty owed by the defendant to the deceased was to exercise reasonable care, to construct a platform which was reasonably safe and adequate to accomplish the purposes for which it was built, in the light of all the facts and circumstances as shown by the evidence in this case.

You are instructed that if from a preponderance of the evidence and from the instructions given you in this case your findings should be in favor of the plaintiff, the damages

to be awarded to her, if any, must be limited to such sum of money as you may deem fair and just compensation to her for the net pecuniary or monetary loss, if any, which you may believe from a preponderance of the evidence she has necessarily sustained by reason of the death of her father, Gary Lee Neely, and also having regard to the mitigating or aggravating circumstances attending the alleged wrongful act, negligence or default on the part of the defendant in this case.

Your verdict in no event, however, may exceed the sum of \$25,000, which sum is the maximum allowed by statute, and the amount—well, that's the maximum allowed by statute in this state.

Now, the net pecuniary or monetary loss, if any, sustained by the plaintiff by reason of the loss of her father is equivalent to the pecuniary or monetary benefits, if any, which the plaintiff might reasonably have expected to have received from a continuation of his life.

In assessing plaintiff's damages, if any, you should consider the age, health and condition of life of both the plaintiff and her deceased father, his habits of industry, his ability to earn money, his disposition to aid and assist plaintiff, the probable duration of the life of the plaintiff's deceased father, if he had not died as the result of the accident.

Now, in this connection, you are instructed that the life expectancy of Gary Lee Neely at the time of his decease was forty-three and ninety-nine hundredths years.

[fol. 72] The Court further instructs you that it is difficult to adduce direct evidence of the exact pecuniary or monetary loss occasioned the plaintiff by the death of her father, and you are permitted to determine the question of damages from your own observations, experience and knowledge, conscientiously applied to the facts and circumstances of this case.

In this connection, however, you are further instructed that you should not allow anything to the plaintiff by way of exemplary damages or the punishment of the defendant.

You are instructed that you should not be governed or influenced by sympathy for the plaintiff because Gary Neely lost his life in an accident, and you should not be governed or influenced by any prejudice or feeling, either in favor of or against the plaintiff or in favor of or against the defendant, but in arriving at your verdict in this case you should be governed solely by the evidence given from the witness stand and the instructions of the Court.

You, ladies and gentlemen, are the sole judges of the facts and credibility of the witnesses who have testified in this case, as I have previously told you.

In passing upon the credibility of any witness, you have a right to take into consideration his or her conduct or demeanor on the witness stand, his or her interest if any in the outcome of the case, the reasonableness or unreasonableness of the testimony given, its probability or lack of probability, the opportunities which the witness had to observe the facts concerning which he has given testimony, the consistency of statements upon the witness stand with those made at other times and places as shown by the evidence in the case.

All of these things you may take into consideration in passing upon the credibility of any witness who has testified in this case, and if you believe that any witness who has testified has wilfully testified falsely to any material matter, you are at liberty to disregard the whole or any part of that witness's testimony.

The instructions which I have given you, ladies and gentlemen, contain the law that will govern you in this case, and in determining the facts you should only consider evidence given upon the trial. Evidence offered at trial and rejected by the Court and evidence stricken from the record by the Court should not be considered by you. The opening statements and arguments of counsel and the remarks of Court and counsel are not evidence. The arguments, statements and objections made by counsel to the Court or to each other and the rulings and orders made by the Court and remarks made by the Court and not directed

to you should not be considered by you in arriving at your verdict.

No single one of the instructions which I have given you contain all of the law, but they are related and should be taken and considered together by you as a whole.

I am sure you understand, ladies and gentlemen, that your verdict must be unanimous.

When you retire to your jury room, you will select one of your members as foreman of the Jury.

You will be furnished with two blank forms of verdict, one blank form for the plaintiff and one for the defendant. If you reach a verdict for the plaintiff, you should insert the amount of damages which you find plaintiff to be entitled to under the evidence in this case in the blank space which is set out for that purpose, and you should cause that verdict to be signed by your foreman. If you reach a verdict for the defendant, you should cause that verdict to be signed by your foreman.

In other words, ladies and gentlemen, you will only cause one of the verdicts to be signed by the foreman, and when you return to report your verdict you will return both the signed verdict, the unsigned verdict, together with any of the exhibits which you may take to your jury room for further examination.

Does the plaintiff have exceptions to instructions given?

At the Bench.

Mr. Kripke: May it please the Court, the plaintiff objects to all instructions which mention the words "contributory negligence" on the grounds that the issue of contributory negligence should not be submitted to this Jury, there being no evidence of such contributory negligence.

[fol. 74] Also, the plaintiff objects to the phrase to the effect that the defendant is not an insurer of the safety of the plaintiff on the ground that it is misleading. It injects insurance into this case in a strange backdoor fashion and generally is misleading in its terminology.

The Court: Defendant have any?



Mr. Mott: The defendant objects to the giving of any instructions to the Jury which would enable them to return a verdict for the plaintiff for the reasons given in support of defendant's motion for directed verdict at the close of plaintiff's case and at the close of all the evidence.

The defendant objects to the instruction by the Court to the effect that the defendant had a duty toward the plaintiff, since that is not the law.

Also, to that portion of the damage instructions wherein the care, guidance and so forth of the decedent are mentioned.

The Court: That was changed.

Mr. Mott: I will withdraw that. I didn't hear it right. I believe that's all.

In Open Court.

The Court: Will the Marshal come forward and be sworn, please?

(The Marshal was sworn. The Marshal and the Jury withdrew.)

The Court: The court will be in recess, subject to call.

(Whereupon, the court was recessed at 3:35 o'clock p.m.)

(A verdict for the plaintiff was returned at 4:20 o'clock p.m.)

Filed May 26, 1964.

[fol. 75] Clerk's Certificates (omitted in printing).

[fol. 80] Minute entry of argument and submission—January 4, 1965 (omitted in printing).

[fol. 81]

IN THE UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 7796—March Term—1965

MARTIN K. EBY CONSTRUCTION Co., Inc., Appellant,

vs.

SANDRA LEE NEELY, by her legal representative and guardian, Cecile V. Neely, Appellee.

Appeal From the United States District Court for the District of Colorado.

John C. Mott of McComb, Zarlengo and Mott, Denver, Colorado, for Appellant;

Kenneth M. Kripke of Kripke & Friedman, Denver, Colorado, for Appellee.

OPINION—Filed April 26, 1965

Before PICKETT, HILL and SETH, Circuit Judges.

PICKETT, Circuit Judge.

[fol. 82] This is a diversity action brought by the Guardian of Sandra Lee Neely, a minor, to recover damages from Martin K. Eby Construction Company, Inc. for the alleged wrongful death of her father, Gary Lee Neely. It was alleged that Neely's death was proximately caused by Eby's negligence in the construction, maintenance and supervision of a scaffold, or platform, located in a missile silo being constructed near Elizabeth, Colorado for the United States. Eby admitted the death of Neely, but denied that it was negligent or that its acts were the proximate cause of Neely's death.

The case was tried to a jury. At the close of plaintiff's evidence and again at the close of all of the evidence, defen-

dant moved for a directed verdict in its favor, alleging, among other things, that there was no evidence of negligence on its part, that there was no evidence tending to show that anything it did, or failed to do, proximately caused Neely's death, and that there was no evidence that it breached any duty owing to Neely. Both motions were overruled and the case submitted to the jury, which returned a verdict in favor of plaintiff in the sum of \$25,000. Thereafter defendant filed a motion for judgment notwithstanding the verdict in accordance with its motions for directed verdict or, in the alternative, for a new trial. The trial court denied the motions and entered judgment on the verdict in favor of plaintiff. The dispositive question presented here is whether the plaintiff's evidence was sufficient [fol. 83] to go to the jury on the issue of negligence and proximate cause.

The missile silo in question was being constructed and equipped by several different contractors. It is a cylindrical structure approximately 50 feet in diameter and 130 to 140 feet in depth. For construction purposes, it was divided into four Quadrants as follows: Quadrant I—the southeast one-fourth of the silo; Quadrant II—the northeast one-fourth; Quadrant III—the northwest one-fourth; and Quadrant IV—the southwest one-fourth. A square steel framework, called a "crib" is located inside the silo and it forms the frame within which the launcher rides up and down. Outside of the crib are two counterweights. These counterweights are between the crib and the silo's outer wall. One of them is located in each of Quadrants II and III, or the northeast and northwest portions of the silo. The counterweights are of an odd shape so as to conform with and fit between the straight side of the steel crib and the rounded outer wall of the silo, and slide up and down, as the launcher moves, within a system of fixed rigid rails. The launcher system is an elevator mounted within vertical rails, by which the missile is raised from its underground storage position to its firing position. Its movements are controlled and stabilized by the counterweights which go down as the launcher rises, and vice versa. The scaffolding

and platforms required during the course of construction were furnished and built by Eby as a subcontractor on the [fol. 84] project. Neely's employer was also a subcontractor, whose contract provided that it would furnish the engineering services and also the work done by the millwrights and other craftsmen who were employed by yet another contractor. Construction on the site was almost completed at the time Neely fell to his death from a platform which had been built near the top of the silo by employees of Eby. There remained to be done only the testing of the launcher system and the installation of the missile itself.

Sometime prior to the testing, Eby's carpenters had constructed a wooden platform between the counterweights which was to be used by those engaged in making the tests. The day silo captain, or millwright foreman, Blanchard, discovered that it was too large and interfered with the measurements that had to be taken from a drive locking mechanism at the bottom of the silo and the counterweight locking mechanism located about 6 feet below the top of the silo. He decided that the platform would have to be modified, and directed Eby's foreman to make the necessary changes so that the measurements could be made without interference from it. The platform was about two feet above the counterweights and after the changes had been made it did not cover the entire space between the counterweights. After the modifications had been made, Blanchard told the millwrights that they could begin making the critical measurements. At about the time the measurements were to be made, Blanchard observed his fellow employee, [fol. 85] Neely, who was the night silo captain, standing on the platform. He asked Neely how things were going and Neely replied "everything is under control." Blanchard also testified that when he left the area it was well lighted, that he could see the counterweights and the platform as well as the space between them, and that the platform was on the level requested by him in his directions to Eby's foreman. The evidence is clear that the platform, both before and after the modification or reconstruction, was



located in the same place. It extended in a north-south direction from the steel crib to the outer wall of the silo, and was supported on the south end by I-beams which were a permanent part of the steel crib. The north end rested on water pipes which were permanently fixed along the outer silo wall. The platform was between the two counterweights so that, facing north from the center of the silo, the one in Quadrant II was east and the one in Quadrant III was west of it. The platform was not more than two feet above the counterweights, on a vertical plane because of the fixed positions of the I-beams and water pipes, and it was one or two feet away from each counterweight, on a horizontal plane. There was a railing on the platform that commenced about 3 feet from the steel crib and ran along the Quadrant II, or east side, and continued along the end next to the outer wall. There was no railing along the Quadrant III, or west side, of the platform.

In addition to Neely, there were three other men engaged in making the measurements. It was Neely's duty to record [fol. 86] the measurements when made by the others. To make the measurements, it was necessary that the four men be on top of the counterweight. Each of them stepped, or jumped, from the platform to the counterweight in Quadrant III, and completed the measurements there. Wilhoit, one of the four men, testified that he then proceeded from that counterweight to the platform, walked across it, stepped on the steel crib through the opening left in the rail there, walked along the steel crib, and then jumped over onto the top of the Quadrant II counterweight. His testimony as to what happened next is as follows: "I took hold of the cables that is coming into the counterweight with my right hand. I turned for a minute to see if my buddy and Mr. Neely were coming over at that time to help with this one, if they were ready. Just as I turned, I saw Mr. Neely coming across the scaffolding, and I didn't keep an eye right on him at the time. I just looked to see if they were coming. I took my safety belt and snapped it around, which it has a cable on it, snapped it around the cables and snapped it on my other side. Just as I did that, I just hap-

pened to glance up and saw Mr. Neely coming head first by the counterweight. With my left hand I made a grab and grabbed the back of his shirt. With a sudden jerk his shirt flipped out of my hand and he proceeded down." Wilhoit was the only witness who saw Neely fall. The other two workmen who were present were not called to testify, and there was no other evidence of the cause of the accident.

[fol. 87] A trial court in this circuit has the duty to direct a verdict "where the evidence is without dispute or is conflicting but of such a conclusive nature that if a verdict were returned for the plaintiff or defendant, as the case may be, the exercise of sound judicial discretion would require that it be set aside." *Mutual Life Ins. Co. of New York v. Bohlman*, 10 Cir., 328 F.2d 289, 295, and cases cited therein. *Auto Transports, Inc. v. Hinman*, 10 Cir., 332 F.2d 553; *United States v. Oklahoma City Retailers Ass'n*, 10 Cir., 331 F.2d 328. We think the motion for a directed verdict in favor of Eby should have been granted.

Viewing the evidence in the light most favorable to the plaintiff, it establishes only that on the day in question Eby's employees were directed to modify a platform or scaffolding so that it would not interfere with certain critical measurements that had to be made within the silo;<sup>1</sup> and that Eby's employees made the necessary changes. Neely and three other men began to take the measurements and had completed those on the Quadrant III counterweight; as they were moving over to take the measurements of the Quadrant II counterweight, Neely was observed coming across the platform, and the next thing that is known is that he was falling into the silo. There is no evidence of the cause of Neely's fall. The uncontradicted evidence does show that the platform did not break, that the railing did not break, and that there were no grease spots on the platform upon which he might have slipped. In short, the most that the evidence establishes is that Neely was on a platform constructed by Eby's employees at the time he fell.

<sup>1</sup> The measurements required the use of a plumb bob which could not be made without a narrowing of the platform.

It is a fundamental rule of law that the burden is upon the one asserting negligence to prove it by a preponderance of the evidence, and such burden is not sustained by evidence that is surmise, speculation or conjecture. *Letts v. Iwig*, (Colo. 1963), 384 P.2d 726; *Perry Lumber Co. v. Ruybal*, 133 Colo. 502, 297 P.2d 531; *Gordon v. Clotworthy*, 127 Colo. 377, 257 P.2d 410; *Coakley v. Hayes*, 121 Colo. 303, 215 P.2d 901. The burden is not met in Colorado by the showing of the mere happening of an accident or the occurrence of an injury. *Remley v. Newton*, 147 Colo. 401, 364 P.2d 581; *Drake v. Lerner Shops of Colo. Inc.*, 145 Colo. 1, 357 P.2d 624; *Perry Lumber Co. v. Ruybal*, *supra*.

It is, of course, the rule that negligence may be established by the facts and circumstances surrounding the accident or injury. *Remley v. Newton*, *supra*. In reliance upon this rule, appellee points out that the platform, as reconstructed, did not extend to the counterweights, but was one or two feet from the edges, and contained a railing along most of the east side and the north end. Appellee also points out that under the testimony, Neely could only get to the Quadrant II counterweight either by climbing over the railing or by going along the route taken by Wilhoit. It argues that from these circumstances the jury could infer negligence in that the platform was too small and the railing should not have been there. However, there is no evidence from which it could be inferred that the size of the platform caused Neely to fall. Nor is there any evidence to show that the railing was unnecessary or that it should not have been placed there. However, assuming for the sake of argument that the jury could by inference find negligence on the part of Eby in that the platform was too small and the railing unnecessary, it by no means follows that appellee is entitled to recover upon such proof. Under Colorado law, proof of negligence alone is not sufficient to impose liability. There must also be proof that the negligence was the proximate cause of the injury. *Perry Lumber Co. v. Ruybal*, *supra*; *Maloney v. Jussel*, 125 Colo. 125, 241 P.2d 862; *Clark v. Wallace*, 51 Colo. 437, 118 P. 973; *Kent Mfg. Co. v. Zimmerman*, 48 Colo. 388, 110 P. 187. Proximate cause is that which in natural and continued

sequence, unbroken by any efficient, intervening cause, produced the result complained of and without which that result would not have occurred. *Hook v. Lakeside Park Co.*, 142 Colo. 277, 351 P.2d 261; *Stout v. Denver Park & Amusement Co.*, 87 Colo. 294, 287 P. 650; *Town of Lyons v. Watt*, 43 Colo. 238, 95 P. 949. In *Mosko v. Walton*, 144 Colo. 602, 358 P.2d 49, 52, the Colorado Supreme Court stated the rule as follows:

"Their negligent act or omission must have been such that without it the injury would not have occurred. \* \* \* The rule of proximate cause requires proof that but for [fol. 90] the defendants' negligence, the damage would not have occurred. \* \* \* Where the evidence, as here, presents no more than an equal choice of probabilities, it is not substantial. \* \* \* 'No number of mere possibilities will establish a probability.' \* \* \*"

Proximate cause is ordinarily a question of fact for the jury, but where the facts are undisputed, it becomes a question of law for the court. *Stout v. Denver Park & Amusement Co.*, supra; *Clark v. Wallace*, supra. In this case, the undisputed facts show a total lack of competent evidence to connect the fall by Neely with the alleged negligence on Eby's part. There is no adequate showing of a causal connection between the alleged smallness of the platform or the location of the railing or the lack of additional railings, and Neely's fall. It may, of course, be conceded that the platform might possibly have had something to do with his fall, but there is nothing in the record to show what it was.

We conclude that the record wholly fails to disclose sufficient evidence to establish either negligence on Eby's part or, assuming such negligence, that it was the proximate cause of Neely's death.

Reversed, with instructions to dismiss the action.

[File endorsement omitted]



[fol. 91]

IN UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

JUDGMENT—April 26th, 1965

Before Honorable John C. Pickett, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court with instructions to dismiss the action, and that Martin K. Eby Construction Co., Inc., appellant, have and recover of and from Sandra Lee Neely, by her legal representative and guardian, Cecile V. Neely, appellee, its costs herein.

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[On June 1, 1965, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Colorado.]

[fol. 92] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 93]

## SUPREME COURT OF THE UNITED STATES

No. 383, October Term, 1965

SANDRA LEE NEELY, etc., Petitioner,

v.

MARTIN K. EBY CONSTRUCTION Co., INC.

## ORDER ALLOWING CERTIORARI—November 15, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted and the case is placed on the summary calendar. In addition to all the questions presented by the petition, counsel are requested to brief and discuss at oral argument the following questions:

"1. Whether the Court of Appeals, after deciding that respondent should have been granted a judgment n.o.v., had power under Rule 50 of the Federal Rules of Civil Procedure and our decisions in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212; *Blo Globe Liquor Co. v. San Roman*, 332 U.S. 571; and *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801, to order the case dismissed and thereby deprive petitioner of any opportunity to invoke the trial court's discretion on the issue of whether petitioner should have a new trial?

"2. Whether the Court of Appeals erred in ordering the District Court not merely to enter a judgment n.o.v. for respondent but to dismiss plaintiff's case in view of [fol. 94] Rule 50(c)(2) of the Federal Rules of Civil Procedure which gives a party whose verdict has been set aside the right to make a motion for a new trial not later than 10 days after entry of the judgment notwithstanding the verdict?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.